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Brief of Appellee on the Merits #34615

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No. 34,615.

In the Supreme Court of Ohio

APPEAL FROM
THE COURT OF APPEALS OF CUYAHOGA COUNTY.

STATE OF OHIO,
Plaintiff-Appellee,

vs.

SAM H. SHEPPARD,
Defendant-Appellant.

BRIEF OF APPELLEE ON THE MERITS.

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STATEMENT.

The State has refiled the brief heretofore submitted on the Motion for Leave to Appeal, as a response to the matters contained in the briefs refiled by the appellant, and also in response, in so far as applicable, to the new and revised assignments of error.

THE EVIDENCE.

The defendant, Dr. Sam H. Sheppard, thirty years of age, resided at 28924 Lake Road, Bay Village, Ohio, with his wife, Marilyn Sheppard, age thirty-one, and their son, Samuel Reese Sheppard, Jr., age seven, known as "Chip."

The defendant worked at Bay View Hospital, located in Bay Village, Ohio. Working at the hospital also were the defendant's brothers, Dr. Stephen Sheppard and Dr.

Richard Sheppard, Jr., all osteopathic physicians and surgeons.

The home of the defendant is located on the north side of Lake Road, which extends in an easterly and westerly direction. A door leads to a screened-in porch on the so-called front of the home, which faces Lake Erie on the north. Beyond this porch to the north is a lawn of some 20 or 30 feet, ending in a sharp descent, at the base of which is a beach on Lake Erie. There is a series of 52 steps from the top of the hill leading down to a bath house and in turn to the beach. The area from the top of the hill to the beach is covered with thick, high grass, brush, weeds and stones.

A wide lawn extends to Lake Road from the back, or south side, of the home. There is a door on the south side of the house, leading to a vestibule to the west of which is the kitchen. To the east of the vestibule is a room that was used as a combination den and doctor's office. In the kitchen there is a door leading to a series of eight steps descending into the basement.

The vestibule leads into an L-shaped living room in which there is an assortment of furniture and a television set against the north wall. From both the kitchen and the living room three steps lead to a small landing, and from there is a stairway to the second floor. Both on the wall at the point of the small landing leading to the second floor, and at the top of the stairs in the second-floor hallway are electric light switches for lights that illuminate both the stairway and the upper hallway.

Directly at the top of the stairs and across this hallway is the room that was occupied by the murdered Marilyn. To the west off this hallway there is a guest bed-

room. Chip's room was next to and east of Marilyn's room. Across the hallway is a reading room in which was the only light burning at the time of the arrival of the Houks and the police. Another guest bedroom is located to the east of this room, occupied the night before the murder by Dr. Lester Hoversten. Also across from Chip's room is a bathroom.

On Thursday afternoon, July 1, 1954, Dr. Lester Hoversten, a former schoolmate of the defendant, arrived at the defendant's home as a guest. He came there from the Grandview Hospital in Dayton, Ohio, where he had been working. He stayed at the Sheppard home until the morning of July 3, 1954, when he left to visit Dr. Richard Stevenson, at Kent, Ohio, where he spent the evening and played golf the next day. He left most of his clothing and luggage behind at the Sheppard home.

On Saturday, July 3, 1954, arrangements were made between Marilyn and Nancy Ahern for the Sheppards and the Aherns to spend that evening together. Don and Nancy Ahern reside at 29146 Lake Road, Bay Village, had known the Sheppards for approximately one year prior to July 4, 1954, and were their close personal friends. Mr. and Mrs. Ahern and the defendant and his wife assembled at the Ahern home at about 6:00 p.m. At 7:00 p.m. the defendant left to go to Bay View Hospital, returning to the Ahern home about 7:30 p.m. Cocktails were served at the Ahern home, where they each had approximately two drinks. After a short time they all went to the defendant's home, following Marilyn, who had gone there shortly before to make preparations for dinner.

Before dinner, the defendant and Don Ahern took the children down to the basement, where the defendant

instructed them in the use of a punching bag that was suspended there. At about 9:00 p.m. they all commenced eating a substantial dinner, which was completed at about 10:00 p.m. Mr. Ahern then took his children home and returned. Chip was put to bed. At one point Mr. Ahern, who operates a deodorant business, with the defendant went both upstairs and down to the basement of the Sheppard home, part of which had burned some time previously, to see if they could detect any peculiar odors (R. 2029-2031). Mr. Ahern testified that he did not see anybody upstairs (R. 2031) at that time.

All later watched television. The defendant had on a brown corduroy jacket over a white T-shirt. He was reclining on a couch in the L of the living room. This couch was located adjacent to the first landing of the stairway leading to the second floor, and it could be seen from the landing and lower part of the stairway.

The Aherns left at approximately 12:15 a.m., before which time Mrs. Ahern had locked the door on the north side of the living room and latched the night chain into the closed position. Marilyn accompanied them to the south door and as they left, the defendant remained asleep on the couch previously described, still wearing the corduroy jacket and T-shirt.

On the morning of July 4, 1954, at approximately 5:50 a.m. J. Spencer Houk, the Mayor of Bay Village, received a phone call from the defendant, in which the defendant said:

> "Sam said, 'My God, Spen, get over here quick. I think they've killed Marilyn.'
>
> And I said, 'What?'
>
> And he said, 'Oh, my God, get over here quick.' " (R. 2264.)

The Houks were personal friends of the Sheppards and reside at 29014 Lake Road, Bay Village. Immediately after this call, Mr. and Mrs. Houk went to the Sheppard home, where, at the time of their arrival, there was one light burning upstairs in the reading room. They entered the Sheppard house from the south, or Lake Road, door, which at that time was unlocked. In the vestibule, outside the door to the den, there was a doctor's medical bag lying open on the floor, with some of its contents spilled on the floor (State's Exhibit 11). Two wings or compartments in this bag were unopened and had not been disturbed (R. 2521, 3050). The Houks went into the den and there found the defendant. At this time the defendant was wearing shoes, socks and trousers which were wet. He was bare from the waist up and had a bruise on his face in the area of the right eye.

Houk testified:

> "Well, we went immediately into the den, which is to the right—the right door off the hallway, and Dr. Sam was half sitting—I would say more slumped down in his easy chair, and I immediately went up to him and asked what happened, words to that effect, and he said, 'I don't know exactly, but somebody ought to try to do something for Marilyn,' and with that, my wife immediately went upstairs, and I remained with Dr. Sam, and I said something to the effect of 'Get ahold of yourself,' or something like that; 'Can you tell me what happened?'
>
> And he said, 'I don't know. I just remember waking up on the couch, and I heard Marilyn screaming, and I started up the stairs, and somebody or something clobbered me, and the next thing I remember was coming to down on the beach.'

And that he remembered coming upstairs, and that he thought he tried to do something for Marilyn, and he says, 'That's all I remember.' " (R. 2273.)

In the den was a desk, the drawers from which had been removed and some of them placed on top of one another in the room. The record discloses that later when Dr. Stephen Sheppard arrived, he accidentally kicked one of these drawers, spilling its contents onto the floor. On the floor behind this desk, Marilyn's bloodstained wrist watch was found by the police.

Mrs. Houk went upstairs and found Marilyn in bed, dead. Chip was asleep in his room.

The next person on the scene after the Houks was Officer Fred Drenkhan of the Bay Village Police Department. Drenkhan received the call at about 5:57 a.m. and arrived at the scene at 6:02 a.m. The Bay Village Police Department, for which the defendant was police surgeon, consists of some seven full time policemen and four part time police officers, most of whom were personally well acquainted with the defendant and other members of the Sheppard family.

Upon going into the house, Drenkhan first looked into the den and then immediately went upstairs by way of the kitchen. Going upstairs he noticed the couch on which the defendant had been asleep and on it he saw, neatly folded, the defendant's brown corduroy jacket (State's Exhibit 8) (R. 2491-93).

In the bedroom Drenkhan saw Marilyn lying on a four-poster bed, her head about three-fourths the way down on the bed, with both her legs hanging over the end and under a cross-bar, one leg exposed and the other covered with a white sheet. She was wearing a checkered

blouse on the upper part of her body, pulled up so that her breasts remained exposed. Her head was severely beaten. There was a great quantity of blood on the bed and many blood spots on the south and east walls. There were spots of blood in other parts of the room also, and on the furniture (State's Exhibits 9 and 10).

There was a second twin bed in this room, and these beds were separated by a night stand on which there was a telephone, a clock, and a writing pad (R. 2970). The second bed had not been slept in and the sheets had been partially folded back. There was a chest of drawers and a chair in the room, with certain of Marilyn's clothing on it, and near it, on the floor, there were a pair of panties and two pairs of Marilyn's shoes. The distance between the east wall and Marilyn's bed is approximately four feet.

Later on, after the arrival of the Coroner, when the sheet covering part of Marilyn's body was lifted, it was discovered that she was wearing one pajama pant leg but the other leg was bare.

Officer Drenkhan testified that there were three windows in this bedroom. One was partially open but the screen on it was locked from the inside (R. 2513). The other two windows were locked from the inside, and none of them showed any marks or signs of forcible entry. An inspection of the entire home disclosed that nowhere on the doors or windows was there any sign of forcible entry (R. 2533) (R. 3563-68), and in her bedroom, except for her appearance and that of the bed on which she was lying, nothing appeared to have been disturbed.

In the living room was a drop-front desk with four drawers. The lower three drawers were partially pulled

out, the top one being closed (State's Exhibit 13). The contents of these drawers did not appear to have been disturbed. On the floor, in front of this desk, there was found a small quantity of writing paper, tax stamps, and other miscellaneous papers, not in great disarray. In the garage, later that morning, Drenkhan saw the defendant's Lincoln Continental, his Jaguar, and a jeep used in Civil Defense work.

Officer Drenkhan testified that he was on duty on the night of the murder, patrolling Lake Road, and that he drove past the Sheppard home approximately five or six times during the night, and observed no hitchhikers or suspicious persons along the road (R. 2483).

Drenkhan was followed to the scene by Fireman Richard Sommers, who had been directed to bring the ambulance, which he did, and by Patrolman Roger Cavanaugh.

At 6:10 a.m. Dr. Richard Sheppard arrived at the scene and Mayor Houk heard the following conversation between Dr. Richard and the defendant:

> "Dr. Richard bent over Dr. Sam, and I heard him say that, 'She's gone, Sam,' or words to that effect, and Sam slumped farther down in his chair and said, 'Oh, my God, no,' or words to that effect.
>
> And then I heard Dr. Richard say either, 'Did you do this?' or 'Did you have anything to do with it?'
>
> And Sam replied, 'Hell, no.' " (R. 2279.)

Dr. Stephen Sheppard arrived at the defendant's home at approximately 6:15 a.m. With the assistance of Dr. Carver from Bay View Hospital, he took the defendant to his station wagon, and along with Mrs. Betty Sheppard, Dr. Steve's wife, they brought the defendant to Bay View

Hospital. All this took place within a very few minutes after Dr. Steve's arrival, and at a time when there was a stretcher in the house and an ambulance in the yard. At or about the same time, Dr. Richard Sheppard removed Chip from the home. All of this was done without asking permission of the police officers.

In daylight, shortly before 6:30 a.m., Officer Drenkhan went down to the lake, and while standing on the platform of the Sheppard bath house, he observed that there was approximately five feet of beach in the area immediately in front of the bath house; that the beach at the foot of the stairs and in the surrounding area was smooth, and that there was no indication of anyone having been on the beach (R. 2536).

Drenkhan had the following brief conversation with the defendant on the morning of July 4th:

> "Q. And what did you say to the defendant, and what did the defendant say to you?
>
> A. I asked the defendant what had happened. He said that he heard Marilyn scream, that he remembered fighting on the stairs, that he was in the water, and then that he came upstairs.
>
> Q. Yes.
>
> A. That was all. That was the conversation.
>
> Q. Did you have any further conversation with him at any time that morning?
>
> A. No, I didn't." (R. 2557.)

Some time between 6:30 and 7:30 a.m., Drenkhan called the Detective Bureau of the Cleveland Police Department and asked for assistance. Drenkhan made no further attempt to question the defendant until July 8th.

Chief John Eaton of the Bay Village police stated that he arrived at the scene some time between 6:25 and 6:30 that morning, and while going upstairs to the murder room, he also noticed the defendant's brown corduroy jacket, neatly folded, lying on the couch, as previously described. He stated that a quantity of money was found in the house in various places, including $4 in change in a dressing table in the east bedroom, $100 in a desk drawer in the den, $20 in a bedroom on the second floor, and some $30 in a copper stein in the den.

Deputy Coroner Lester Adelson, a specialist in pathology, testified on behalf of the State as to the cause of Marilyn's death. She was found to be four months pregnant. There were 35 separate injuries on her head, face and hands. Of these, approximately 15 were to the head, causing many gaping lacerations of the skull and resulting in numerous comminuted fractures in this area. No physical injury in or about the vagina of Mrs. Sheppard was observed (R. 1981). Dr. Adelson took a smear from the vagina to examine microscopically and discovered no spermatozoa present (R. 1886). He testified that she came to her death as the result of the following injuries:

> "Q. And will you tell the jury what caused her death?
>
> A. Marilyn Sheppard came to her death as a result of multiple impacts to the head and face which resulted in comminuted fractures of the skull and separation of the frontal suture, the seam I described, bilateral subdural hemorrhages, which means collections of blood immediately above the brain, diffuse bilateral subarachnoid hemorrhages, which are hemorrhages immediately on the brain, and contusion of the brain or bruising of the brain." (R. 1720.)

Coroner Samuel R. Gerber arrived at the Sheppard home on the morning of July 4th at about 7:50 a.m. Later that morning, around 9:00 a.m., he saw the defendant at Bay View Hospital and had a conversation with him in which the defendant related that he was "clobbered" on the back of the head or neck by some unknown "form" when he rushed up to the head of the stairs after hearing Marilyn scream (R. 1380-1384).

Mr. Corrigan would not permit the Coroner, when he arrived at the hospital at 11:00 o'clock on the morning of July 8th, to talk to the defendant (R. 3064-3065). The defendant himself stipulated certain conditions to the Coroner before he would talk (R. 3068).

The defendant left the hospital to attend his wife's funeral on July 7th and was discharged from the hospital on July 8th and he resumed his medical practice on July 12th.

Dr. Gerber held an inquest, beginning on July 22nd, at Normandy School in Bay Village, where the defendant appeared as a witness. The defendant stated under oath at the inquest, among other things, that he had never had an affair with Susan Hayes.

Dr. Gerber testified that at the inquest he asked the defendant the following questions and received the following answers relative to the defendant's encounter with his alleged assailant:

> "Q. Did you see the form on any of the stairways going down?
>
> A. I can't say that.
>
> Q. You did not catch up with it?
>
> A. Not on the way down.
>
> * * *

Q. Did you see him on any landings?

A. I cannot say specifically that I did.

Q. Where is the first time that you saw him?

A. Again?

Q. Yes.

A. It was on my way down from the landing down to the beach.

Q. Which landing are you talking about now?

A. The landing of the beach house.

Q. And where was he at that time?

A. I cannot say specifically.

Q. Was he on the beach?

A. I am not sure.

Q. Or was he at the foot of the stairway?

A. Doctor, under such circumstances, I just couldn't be sure exactly where it was.

Q. What was the condition of the light at that time?

A. I told you the light was not pitch black. It was—

Q. At that time could you see the form, see how it was dressed?

A. That is the time as I progressed down the stairway—that is the time I thought that I could see the form.

Q. Did the form that you saw have trousers on at that time?

A. I am not sure what he had on.

Q. Did he have a coat on?

A. I don't know what he had on.

Q. Did he have a hat on?

A. As I told you, I couldn't say.

Q. Was this a white person or a colored person?

A. I can't say for sure. I somehow after encountering him have the feeling that it was not a colored person, but that is merely a feeling. It is not—a fact that I can say specifically.

Q. Did the color of the hair register?

A. I can't say that I could see the color of the hair.

Q. Did he have any hair?

A. I felt that he had a large head, and it seemed to me like there was, as I mentioned earlier, a sort of a bushy appearance.

Q. You say you encountered him on the beach?

A. Yes.

Q. Did he grab you or did you grab him?

A. Well, I felt as though I grabbed him.

Q. In other words, you caught up to him?

A. That was my feeling, but it seemed as though I had caught up with a steam roller.

* * *

Q. In other words, you caught up to him?

A. That was my feeling, but it seemed as though I had caught up with a steam roller, some immovable object that just turned and made very short work of me.

Q. When you grabbed him, what kind of clothes did he have? What did you feel?

A. I can't say that I felt anything specific.

Q. Did you feel any clothes?

A. I can't say for sure.

Q. You don't know whether he was naked or not? Did he have any clothes on?

A. I felt that I grasped something solid.

Q. Was it a human being?

A. I felt that it was.

Q. Did you have the T-shirt on at this time?

A. I don't have any recollection of the T-shirt.

Q. Did you have a corduroy jacket on at this time?

A. I don't know.

Q. After you grappled with him, or he grappled with you, what happened?

A. I became—I was—I had a twisting, choking sensation, and that was about all I remember.

* * *

Q. Where was the twisting, choking sensation? Other than the choking sensation, where was the other sensation? That is the question.

A. Other than what I told you, I don't believe I can give you any other specific information.

Q. What did you realize next?

A. I realized being—I had a feeling of moving back and forth or being moved back and forth by water.

* * *

I realized—I had a feeling of moving back and forth or being moved back and forth by water. I felt —I think that I may have coughed or choked a time or two. I slowly came to some sort of consciousness. I got to my feet and went up the stairs. The time element—

Q. Did you swallow any water?

A. I don't know. Very likely I did.

Q. When you first came to, where was your head and where was your feet? Where were your feet?

A. My head was toward the south and my feet were into the lake.

Q. How high were the waves at that time?

A. The waves were—well, I didn't notice the waves specifically, but it seemed as though they were moderately high. They were not very high, but it was not extremely calm.

Q. Was it daylight then or was it still dark?

A. I won't say that it was daylight, but it was much lighter. It was definitely light enough so you might call it daylight, but it was not bright day like it is now." (R. 3508-3513.)

Dr. Gerber described further that when examining Marilyn's body on the morning of July 4th, he observed the impression of the band of her wrist watch in the dried blood on her left wrist at the base of the thumb (State's Exhibits 9 and 45). He testified in that connection:

"Q. Now, Dr. Gerber, when you examined the body of Marilyn Sheppard on July 4th, did you observe anything on her left hand in the vicinity of her wrist?

A. Yes, sir.

Q. What did you observe?

A. I observed some dried blood that had the impressions of the bracelet of a watch on the left wrist.

Q. And where on the wrist was that impression?

A. Down towards the back of the hand.

Q. Will you show on that wrist where that was?

A. Right across this way (indicating).

Q. I hand you what has been marked State's Exhibit 9, and ask you to point out—

The Court: Let's get the record clear on that. Show indicating over the base of the thumb. Is that right?

The Witness: Beginning back at the wrist, at the bone.

The Court: Beginning back of the wrist bone and extending over—

The Witness: Coming across the back of the hand.

The Court: —diagonally across the base of the thumb.

Q. Handing you what has been marked State's Exhibit 9, and facing the jury, will you point out where you observed this impression?

A. This is the left hand, and if you look closely right at the base of the thumb, and extending back-

ward, extending up across and up towards the other side, you can see dried blood and you can see the imprint of the bracelet, of a stretch bracelet, over this particular area.

Q. And was that on the left hand, sir?

A. Yes, on the left wrist extending down to the hand.

Q. I will hand you what has been marked State's Exhibit 45 and ask you whether or not that is a fair representation of what you saw on the hand, the left hand and wrist of Marilyn Sheppard?

A. Yes, sir." (R. 3080-3081.)

The Coroner further testified that the lines of the impression indicated that the bracelet was in position when the blood stains were wet and remained in position until the blood was dry (R. 3131).

The pillow found by Dr. Gerber on Marilyn's deathbed was offered as an exhibit. A large, dry, blood spot was evident on one side of the pillow, into which there was imprinted the outline of a surgical instrument or something similar to this type of instrument (R. 3132-33). (State's Exhibits 32 and 34). Dr. Gerber testified that in the largest stain on the pillow was the impression of a two-bladed instrument that had teeth on each end of the blade (R. 3010).

Dr. Gerber testified further that on the basis of the contents of Marilyn's stomach, the time when she had eaten her last meal, and the amount of food consumed by her, the appearance of her body at the time he first saw it, on the autopsy report and other information available, in his opinion she came to her death between three and four o'clock a.m. on July 4th.

When her body was brought to the morgue she had three rings on her left hand, ring finger (R. 3924).

Among the personal effects of the defendant turned over to Dr. Gerber at Bay View Hospital by Dr. Richard Sheppard, Sr., on July 4th were the defendant's trousers, which were damp, and a wallet. In a compartment of the wallet which he had on his person at the time of the murder $60 was found.

Robert T. Schottke, a member of the Homicide Unit of the Cleveland Police Department, who was assigned to assist the Bay Village police, testified that he and his partner, Patrick Gareau, arrived at the Sheppard home about 9:00 a.m. on July 4th. At about 11 that morning, Schottke went to Bay View Hospital and spoke to the defendant for about 20 minutes, and had the following conversation with him:

"Q. Tell us what you said to him and what he said to you.

A. We introduced ourselves, told him we were members of the Cleveland Homicide Squad, and that we had been requested by the Bay Village Police Department to assist them in this homicide. We asked him to tell us everything that he knew in regard to this matter.

Q. And what did he say?

A. At that time he told us that the evening before there was company over, the Aherns, and that later in the evening he had fallen asleep on the couch, and while the Aherns were still there, and that while he was sleeping on the couch he heard his wife scream, he ran upstairs—

Q. Did he say where this couch was located?

A. In the downstairs, in the living room.

Q. Yes. Continue.

A. He heard his wife scream, and he ran upstairs, and when he got into the room he thought he seen a

form. At the same time he heard someone working over his wife. He was then struck on his head—side of the head and knocked unconscious, and when he woke up he heard a noise downstairs. He ran downstairs and he thought he seen a form going out the front door. He pursued this form down the steps, and when he got to the landing at the boat house, he does not know if he jumped over the railing or if he ran down the steps, but he half-tackled this form on the beach. There was a struggle and he was again knocked out.

When he regained consciousness, he was on the beach on his stomach being wallowed back and forth by the waves.

He then went up the stairs into the home, wandered around in a dazed condition. He went upstairs and looked at his wife, attempted to administer to her. He felt that she was gone.

He then went downstairs again, was wandering around trying to think of a phone number. He called a number and it turned out to be Mayor Houk. Mayor Houk came over.

Later on his brother Richard came over, and he was taken to Bay View Hospital.

Q. Do you recall any further conversation?

A. We asked him questions after he told us his story.

Q. I see. In other words, first he made a recitation to you of what happened, is that correct?

A. Yes, sir.

Q. And then you and Gareau asked certain questions, is that correct?

A. Yes, sir.

Q. And did he answer those questions?

A. Yes, sir, he did.

Q. Now, will you please tell this jury what questions you asked and what answers he made?

A. We asked him how the screams sounded to him when he woke up. He said they were loud screams. We asked him how long the screams lasted, and he stated all the while he was running up the steps. We asked him if he was assaulted by the one he heard working over his wife, and he says, no, that he had the impression that he was assaulted by someone else because he was assaulted just about the time he heard someone working over his wife. We asked him how many times he had been assaulted. He said two or three times, at the most. We asked him with what. He said with fists.

Q. He said what?

A. He said with fists. We then asked him if this was in both assaults, the one in the bedroom and on the beach, and he said yes.

We asked him if he could give us a description of the form that he seen running out the front door, and he stated that he was a big man, and we asked him if the man was white or colored. He said he must have been a white man because the dog always barked at colored people.

We asked him if he knew how tall the man was. He said he was bigger than what he was. He was about six foot three. He was dressed in dark clothing, and he was a dark complected white man.

We asked him if he had turned on any lights in the house. He stated no. We asked him if there were any lights on in the house, and he said he doesn't know, he doesn't recall.

We asked him about the beach, and he said that he was being wallowed back and forth by the waves, when he regained consciousness on the beach, that he was stomach down.

We asked him about Dr. Hoversten. We had heard he was a house guest, and he says, yes, he was

staying at the house for a few days, and he said he had left yesterday afternoon to keep a golf engagement in Kent, Ohio.

We then asked him that we had heard rumors to the effect that Dr. Hoversten was infatuated with his wife. He said that he had heard those rumors, that they might be true, but he didn't pay any attention to them because he knew his wife was faithful to him.

We asked him if his wife had any men callers during the day while he was out.

Q. Just a moment.

* * * * *

(Answer read by the reporter as follows:

'We asked him if his wife had any men callers during the day while he was out.')

A. He stated that there were several men who called during the day while he was out, but he didn't think anything of it, and we asked him if he knew the names of these men. He stated that he could not recall them at this time. We asked him if his wife was having any affairs with men, and he stated no.

At that time that was just about the extent of our conversation with him.

Q. And how long did that conversation last, approximately?

A. Approximately 20 minutes.

Q. Would you describe the defendant's appearance during that conversation?

A. He was lying there on the bed and he answered all our questions in a normal tone. He did not ask us to repeat any questions. He answered all of the questions and spoke in a loud enough voice that we could hear. We was able to understand him." (R. 3571-3577.)

The Bay Village police had asked a group of boys to assist them in searching the area north of the home ex-

tending to the lake. At approximately 1:30 p.m. on July 4th, Lawrence Houk, the son of Mayor Houk, found a green cloth bag (State's Exhibit 26) belonging to the defendant in the thick brush slightly to the east of the stairway leading to the beach. He turned this over to Schottke and Gareau, and upon examining it they found a ring, key chain with keys attached, and a watch, all belonging to the defendant (State's Exhibits 26-A, -B, -C), and which the defendant admitted he was wearing while he was asleep on the couch. The watch was an automatic, self-winding one, had water and moisture under the crystal, and there was blood on the face, blood on the band, blood on the rim and blood on the fastener of the watch (R. 3031). The watch was stopped at 4:15 (R. 3026).

Referring to the green bag found by Larry Houk at approximately 1:30 P.M. on July 4th, the defense say at page 68 of their brief:

> "We can agree with some of the conclusions reached by the State as recited at pages 64 and 65 of its brief previously mentioned. There was no blood found on the green bag, and we are willing to go as far as saying that there was no evidence of blood on the green bag. We agree that 'the defendant's watch, the crystal and upper band of which was smeared with blood.' We agree that the jury would be justified in concluding that the wrist watch of the defendant, his key chain and ring were placed in the bag after the blood had thoroughly dried. We so agree not out of any theory, but because the evidence supports it."

Recognizing the damaging effect of this evidence, they proceed to distort the record on it and on page 69 the defense state that Larry Houk:

"said that he found the green bag in an area where there wasn't any brush at all 'at that time' as it had been beaten down. Of course it was beaten down by the searchers and there wasn't any brush at the time the green bag was found."

The defense then conclude at page 70 of their brief that the green bag was taken that morning by some unknown person from the "boat" house near the beach and leave the inference that it was planted there after a group of young men searching the premises had beaten down the brush.

We wish to point out that defense counsel have completely distorted the evidence as to where the bag came from and how and when it was found. The defendant himself stated that the bag containing the tools was in the desk drawer in his den, and the tools were found in the den. The bag itself came—not from the "boat" house—but from the defendant's den.

Shortly after noon of July 4th, after being directed so to do, Larry Houk gathered about twelve boys together. They went down and searched the lake for the weapon for about a half hour, and found nothing of importance (R. 2914). Thereafter, the group of boys proceeded to search the shrubbery and bushes on both sides of the steps on the bank leading down to the lake. A few of the boys had sickles and about three or four of the boys proceeded to chop down the weeds and brushes and the rest of the boys spread out and were looking to see what they could find. The exact testimony appears at Record 2916, as follows:

"Q. And what was the state of the growth of the bushes and the weeds on both sides of the steps when you started?

A. On the west side of the steps it was very heavy. There were small trees, and it was very heavy foliage, I guess.

Q. And how about the east side of the steps?

A. On the east side up near the top it was very heavy, but around the boat house, near the bottom, it wasn't quite as heavy.

Q. Now, just what did the boys do? Was there anybody breaking down the weeds?

A. Well, a few boys had sickles and other instruments with which to chop down the leaves. There were about three or four of those.

Q. About three or four of the boys were chopping down the weeds and bushes?

A. That's right.

Q. And the rest of you were looking to see what you could find?

A. Yes. We spread out.

Q. And you were one of the boys that was doing the searching?

A. That's right.

Q. In the course of that search did you find anything?

A. Yes, I found a green bag.

Q. And do you recall what time of the day it was when you found this bag?

A. About 1:30."

Larry Houk turned the bag and its contents over to Detective Gareau of the Cleveland Police Department (R. 2917).

The testimony of Larry Houk set forth on page 9 of the appellant's brief to the effect that there wasn't any brush at that time and that the brush had been beaten down describes the condition of the bank after the boys had cut the brush and beaten it down and the bag was found, and at the time Larry Houk *marked the spot* where the

bag was found. It most certainly was not a description of the brush and weeds on the bank at the time the bag and its contents were put there. Most certainly, the bag and its contents were planted there—not by Larry Houk or by the officers searching the premises the next morning after the defendant had been removed from the house—but were planted by the defendant in his attempt to simulate a burglary and divert suspicion from himself.

We also wish to note that upon cross-examination by defense counsel, Larry Houk testified at Record 1346 that "There was one boy right next to me when I picked it up and looked at it." Defense counsel then asked him: "Who was" and his answer was "Jimmy Reddinger."

In connection with this most incriminating evidence against the defendant, namely, the planting of this green bag containing his wrist watch, ring and key chain (and what would a burglar want with a key chain) to divert suspicion from himself as his wife's murderer, the evidence shows that the boys were searching for a weapon and that no one searching the premises that morning for a weapon (R. 2540) knew that the defendant's wrist watch and ring and key chain were missing from his person—no one knew that but the defendant and he mentioned this to no one.

On July 4th at 3:00 p.m., Schottke and Gareau, in company with Chief John Eaton of the Bay Village Police, had the following further conversation with the defendant at Bay View Hospital (R. 3586-3591):

> "Q. All right. Now, would you tell this jury what you, Gareau and Chief Eaton, stated to the defendant at that point and what the defendant stated to you?
>
> A. At that time we told Dr. Sheppard that we would like to ask a few more questions. He said all

right, and we asked him at that time when he lay down on the couch to go to sleep, what clothing he had on at that time.

He stated that he was dressed in a corduroy jacket, a T-shirt, trousers and loafers.

We asked him if—what jewelry he had on at that time. He stated his wrist watch, a ring and a key chain with keys on it.

We asked him if he knew where his jewelry was at now. He stated no.

And we then showed him the green bag which we had brought along from the house and asked him if he had ever seen that bag before. He stated it looks just like the bag in which he keeps motorboat tools.

And we asked him where this bag was kept. He stated in the drawer in the desk of his study.

We then showed him the wrist watch and asked him to identify the wrist watch, and he stated that it looks just like his wrist watch, if it is not his wrist watch.

He was then shown the ring and asked if he could identify the ring; he stated that it was his class ring.

We showed him the key chain and the keys and asked him if he could identify them, and he stated that they were his keys and his key chain.

We then asked him how the moisture and the water got into the wrist watch. He stated that a few days before, that he had been playing golf with Otto Graham, that they were caught in a heavy downpour, and at that time the water got into the crystal of the wrist watch, that it was not running properly, his wife was going to take it back to Halle's where she purchased it.

We then told him that there was blood on the band and on the crystal of the wrist watch, asked him if he could tell us how the blood got on there. He stated that he remembered that at the time that he

regained consciousness in the upstairs bedroom, that he had felt his wife's pulse at the neck, felt that she was gone, and at that time he must have gotten the blood on the wrist watch, and then he heard a noise downstairs and ran downstairs.

We told him that the jewelry had been found in a green bag about halfway down the hill near the lake, asked him if he could account how the jewelry got in this bag that was found on the side of the hill.

He says he didn't know how it got there, but someone must have taken the jewelry from him at the time when he was unconscious.

We then told him that we had examined his billfold and clothing at the Bay Village police station, and that his billfold was still in the hip pocket.

We asked, 'If a burglar or someone had taken your jewelry, why didn't they take your billfold?'

He said he remembered at the time when he woke up upstairs he seen the billfold lying on the floor, and that he put it in his pocket and ran downstairs.

We then stated to him that he told us before that he had been on the beach and when he regained consciousness he was being wallowed back and forth by the waves on his stomach, since he was on his stomach, his face would be down, and that he knew as well as we did that an unconscious person can drown in as little as two inches of water.

We asked him how could he account for the fact that he did not drown. He stated that he knew an unconscious person could drown in as little as two inches of water, but that sometimes an unconscious person can help themselves, just like a football player who could play a half a game of football and after the game was over not realize that he was playing football.

We then stated to him that he had told us previously that he had been assaulted two or three times at the most with fists, but that he was wandering

around the home in a dazed condition, and if he can account why he was wandering around in a dazed condition.

He said that he was just like a football player that could be injured in a game and play a half a game of football and not know that he was playing the game.

We then asked him when he had taken off his jacket. He stated that some time during the night he very faintly remembers waking up and being too warm and taking the jacket off and either placing it on the floor or placing it on the couch and then going back to sleep.

We told him that the jacket was found on the couch folded neatly, that if he had placed the jacket on the floor, it would still be on the floor, and that if it had been on the couch and he went back to sleep, he would have laid on the jacket and wrinkled it up.

We asked him if he had turned on any lights at any time when he was in the house. He stated no.

We then told him that we had heard that he had been keeping company with a nurse from Bay View Hospital, that this nurse had quit Bay View Hospital, and that she was now in Los Angeles, California, and that while he was in Los Angeles several months ago and while his wife was staying some place else he was seeing this nurse.

He stated, "That is not true."

We told him we heard that he had also given this nurse a wrist watch, and he stated that it was not true.

At that time I said, 'The evidence points very strongly towards you and that in my opinion you are the one that killed your wife.'

And he said, 'Don't be ridiculous.'

He says, 'I have devoted my life to saving other lives and I loved my wife.'

He was then asked if he would take a lie detector test and he said yes. He asked how a lie detector

worked and we told him it takes the reaction of the respiratory system—

Q. Just a minute, Bob.

Mr. Corrigan: I can't hear you.

The Court: Now go ahead.

A. The respiratory system and the blood pressure and the activity of the sweat pores on the palm of the hand, and that's recorded on a graph and the operator interprets the graph.

He said that due to his present condition that he didn't feel as though this would be a fair test and that he would not want to take the test at this particular time.

We told him that he would be able to take the test, if he wanted to, at the time when he felt better." (R. 3586-3591.)

During this conversation with the defendant, Dr. Stephen Sheppard was in and out of the room several times. In addition to the foregoing, the defendant was asked if there were any narcotics in the house, and he stated, "No, but there may have been a few samples in my desk." Chip was not mentioned by the defendant either in his first or second conversation. On later occasions and in other conversations the defendant said he went to the door of Chip's room and peered into it before going downstairs and onto the beach to struggle with the unknown assailant.

On July 5th, Schottke and Gareau and Deputy Sheriff Carl Rossbach went to the hospital again to question the defendant, but they were not permitted to do so. There they saw Mr. William Corrigan, Sr., and Mr. Arthur Petersilge, attorneys for the defendant, as well as members of the Sheppard family.

On July 8th Schottke and Gareau were present at Bay View Hospital to assist in the interrogation of the defendant but were not permitted to question him, although Officer Drenkhan, who was present at the request of the defendant, together with Deputy Sheriffs Rossbach and Yettra did question him at that time. On July 21, 1954, at the request of the Bay Village authorities, the Cleveland Police Department took over the investigation.

Deputy Sheriff Carl Rossbach testified that he began assisting the Bay Village police on July 5th. On July 5th, 6th and 7th he attempted to question the defendant but was not permitted to do so. On July 8th, with Officer Drenkhan and Deputy Sheriff Yettra, he did question the defendant, and the defendant stated that he was attacked by a tall, bushy-haired form (R. 3841-3846).

On the morning of July 4th, Michael S. Grabowski, a member of the Cleveland Police Department, attached to the Scientific Identification Unit, went to the Sheppard home at about 8:30 a.m. for the purpose of assisting the Bay Village police in the taking of photographs and searching for fingerprints. On the drop-front desk in the living room and in other places he discovered peculiar straight lines as though the surfaces had been wiped with some rough cloth. On the drop-front desk he found only a partial palm print, later identified as Chip's. On the doorknob of the door on the north side of the living room he found some smudged marks, none of which were even partially clear as fingerprints. He examined various other places and objects but no other finger or palm prints were found in the living room or in the den.

Henry E. Dombroski testified that he is a chemist and a member of the Department of Scientific Identification of

the Cleveland Police Department, and that commencing on July 23rd he together with other members of his unit made a scientific investigation of the Sheppard home.

Mary E. Cowan also testified on behalf of the State. She stated that she had been employed by the County Coroner's office for 15 years as a medical technologist. Dombroski and Miss Cowan testified that they found numerous spots that were determined scientifically to be blood spots at various places in the Sheppard home, including the upper hallway, the steps leading to the second floor, the living room, the garage, and the room over the garage. In addition to those, additional tests were made as to some of these spots. In several places on the basement steps and the steps leading to the second floor, spots of human blood were found. Miss Cowan examined the green bag (State's Ex. 26) heretofore described that had contained the defendant's ring, key chain and watch and stated that there were no blood stains anywhere, either on the inner or the outer surfaces of the bag.

Mary Cowan received a sample of Marilyn's blood from Dr. Adelson on July 5th. She typed it and the type was OM (R. 4656). She found that the M factor, the same factor in Marilyn's blood, was present in the blood on the defendant's wrist watch (R. 4664). On Marilyn's wrist watch she found the M factor present (R. 4665).

The trousers of the defendant were submitted to her. She saw a stain on the left leg, measuring 6 x 6¼ inches (R. 4666). She cut out a section from the trousers and tested it and the result of the test indicated that the blood could be group O (R. 4667).

She found hairs and fibers in the left side pocket and the right rear pocket of the defendant's trousers (R. 4677).

Four human hairs were found in each pocket. The hairs were similar and compatible with the hairs from the head of Marilyn Sheppard (R. 4678).

Scrapings were removed at the autopsy from underneath the fingernails of Marilyn Sheppard. No significant fibers or hairs were noted (R. 4771). Mary Cowan testified that the quantity of the material of the fingernail scrapings were microscopic (R. 4676). She testified also that under the thumb she found dried blood and one red wool fiber similar to red wool fiber found adhering to the white wool sock that was submitted to her as the property of the defendant (R. 4736, 4737).

Mary Cowan identified a piece of leatherette picked up by Officer Nichols from Bay Village (R. 3398) on July 5th, which he turned over to Gareau and which Gareau gave to her (R. 3054). At Record 3503 and -4 are State's Exhibit 47 and 47a, which is a card which has on it the description of the leather substance. State's Exhibit 47 and 47a relate to a card describing the fingernail substance and the leather substance that had been previously identified as State's Exhibits 43 and 44. There was received in evidence only one piece of leatherette, which proved nothing in the case, one way or the other.

Schottke had made a thorough examination under the bed and of the carpeting on July 4th and did not find anything unusual on the floor (R. 3562).

Cyril M. Lipaj, a Bay Village police officer, testified that on July 14th an old, battered and torn T-shirt, size 42-44 (R. 3959), was found near the pier of the home adjacent to the Sheppard residence. The testimony shows that this was neither the size nor make of other T-shirts

found in the Sheppard home which were size 38-40 (R. 4104).

Mrs. Doris Bender testified that she lived at 294 Ruth Street, Bay Village, Ohio, and that on the morning of July 4th at approximately 2:15 or 2:30 a.m., she along with her husband and child, were driving past the defendant's home. She noticed that at that time there was one light on upstairs and one on downstairs on the east side of the house (R. 4174-77).

Thomas R. Weigle was Marilyn's cousin. He related that while he was visiting at the defendant's home in March, 1952, *the defendant flew into a rage and administered an unmerciful beating to Chip* (R. 4821).

Elnora Helms, who worked from time to time as a maid at the Sheppard home, testified that when she examined the murder bedroom some two weeks after July 4th, she could not find anything missing therefrom (R. 3984). She also testified that after the defendant and Marilyn Sheppard returned from their spring visit to California they occupied separate beds in the north room, and that prior to such visit they occupied a double bed in the eastern room. The maid also testified that it was only on one occasion when she came to work that the Lake road door was unlocked (R. 3986).

Miss Susan Hayes, age 23, appeared as a witness on behalf of the State, and related that for a period of time she was employed at Bay View Hospital as a laboratory technician. She worked with the defendant on many emergency cases. She worked at Bay View from early in 1949 to December 1952, and again from August 1953 to Febru-

ary 3, 1954, after which she went to California. During that time the defendant expressed his love for her and had sexual relations with her, in the defendant's automobile, at her apartment, and at the Fairview Park Clinic operated by the Sheppards. She testified that on a number of occasions the defendant discussed divorcing his wife with her (R. 4853-4856).

Susan Hayes testified:

"Q. And what did he say? Tell us what the conversation was, please?

A. Well, I remember him saying that he loved his wife very much, but not so much as a wife. *He was thinking of getting a divorce, but that he wasn't sure that his father would approve.*

Q. He said he loved his wife very much?

A. Yes.

Q. He was thinking of a divorce?

A. Yes.

Q. That he did not love her as a wife?

A. Yes.

* * * * *

Q. But he wasn't sure?

A. He didn't say that.

Q. What did he say then?

A. He said he loved his wife very much, but he was thinking of getting a divorce.

Q. And did he say as to how he loved his wife?

A. No.

Q. Do you recall his words on that subject?

A. *Yes. He said he loved his wife very much but that he was thinking of getting a divorce.*

Q. I see. And what else did he say?

A. *That he wasn't sure that his father would approve.*" (R. 4853-4854.)

Before she quit her job at Bay View the defendant gave her a ring as a gift; and before she left for California she gave the defendant her California address.

In March 1954 the defendant and Marilyn went to California and when they reached Los Angeles Marilyn went on to Monterey, California, to stay at the ranch of Dr. Randall Chapman and remained there with Mrs. Chapman. The Chapmans and the Sheppards had been well acquainted for several years. The Chapman ranch is located some 300 miles north of Los Angeles, where the defendant had remained.

Shortly after Marilyn's departure for Monterey, the defendant called Miss Hayes, who was living in a suburb of Los Angeles, and saw her. The same evening they attended a party together at the home of Dr. Arthur Miller, with whom both the defendant and Marilyn had been acquainted for many years. Attending the party were Dr. Randall Chapman and other doctor friends who knew both Marilyn and the defendant. The defendant and Miss Hayes remained at the Miller home that night, sharing the same bed. The following day the defendant drove Miss Hayes to her residence, where she picked up some clothing and returned with him to the Miller home, where she and the defendant lived together for approximately a week, occupying the same room. They had sexual relations there, on numerous occasions. During that week, the defendant, Miss Hayes, the Millers and some others all went to San Diego to attend a wedding. Miss Hayes lost her wrist watch on the trip and the defendant bought her another one. Marilyn Sheppard got to know of this (R. 2154) and there was some discussion between her and the defendant about it.

After staying with Miss Hayes, the defendant drove up to the Monterey ranch with Dr. Randall Chapman, and from there he and Marilyn returned to Ohio.

The evidence established that Dr. Lester Hoversten visited the defendant at Bay View Hospital on July 5th, at which time Dr. Steve came into the room, was irritated and stated that he had left strict orders that no one was to see Sam unless he, Dr. Steve, was first notified (R. 3803). Dr. Hoversten testified relative to the coaching Dr. Steve was giving to the defendant, as follows:

> "Q. Did Steve leave at any time after he came in?
>
> A. Yes. After speaking sharply to me, he turned on his heels and walked quickly out of the room, and then he came back in just a few minutes.
>
> Q. And when he came back in, did he say anything?
>
> A. Yes. I remember I was sitting on the left hand side of the bed, and Steve sat near the foot of the bed, and he advised Dr. Sam to go over in his mind several times a day—
>
> As I recall, Dr. Steve addressed Dr. Sam, and said in words to this effect, 'You should review in your mind several times a day the sequence of events as they happened so that you will have your story straight when questioned,' and then he gave as an example, 'You were upstairs, you went downstairs, and from here to there,' and so forth." (R. 3812-13.)

Dr. Hoversten testified further that the *defendant had written Marilyn a letter concerning a divorce while he was in California and Marilyn had come here in Ohio.* The defendant had permitted Dr. Hoversten to read this letter, at which Dr. Hoversten advised him against sending it (R. 3771-3777).

Dr. Hoversten further testified that the defendant again discussed divorcing Marilyn with him in the spring of 1953. At this time Dr. Hoversten advised the defendant to speak to his parents about this and to go slowly when considering divorce since "he might be actually jumping from the frying pan into the fire" (R. 3779-3781).

The defendant is six feet tall, weighs around 180 pounds, and in past years had been active in many sports including football, tennis, track, and up to July had played basketball with some regularity and was an expert water skier.

Shortly after his arrival at Bay View Hospital on July 4th, X-rays of the defendant were taken, in which there was allegedly found to be a chip fracture in the infra-posterior margin of the second cervical vertebral spinous process. Dr. Stephen Sheppard announced that the defendant had a broken neck. Additional X-rays of this area of the spine were taken on July 7th after the collar and salve on his neck were removed and this supposed fracture did not appear in them. On July 8th, the day after his wife's funeral, the defendant was discharged as a patient from Bay View Hospital, wearing an orthopedic collar, and resumed his osteopethic practice on July 12th.

Dr. C. W. Elkins was called as a witness by the defense. He was personally acquainted with the Sheppards for some time and on July 4th was called in as a consultant specialist. He testified that at no time did he have the opinion or advise that Dr. Sam could not be extensively questioned by the police.

Leo Stawicki and Richard Knitter testified on behalf of the defense. Stawicki testified that he was driving an

automobile on Lake Road on the morning of July 4th, around 2:30 a.m. and noticed a man standing in a driveway next to a tree which he described as six feet tall, with a long face and bushy hair standing up, crew hair cut (R. 6049, 6050, 6097). Stawicki's report to the police came after the Sheppard family had offered a $10,000 reward for the arrest and conviction of Marilyn's killer. Knitter testified that he saw a stranger on the roadway near the Sheppard home on the morning of July 4th, as he was driving along around 2:50 a.m., but did not report it to the police until July 12th, after the reward had been offered.

The defendant took the stand and claimed that on the night in question he was sleeping on the couch downstairs, heard his wife scream and ran upstairs and was knocked out when he entered the bedroom; that he saw a light garment that had the appearance of having someone inside of it (R. 6559) at his wife's bed and that something hit him from behind; that he came to, heard a noise downstairs, went down the stairs and out the door of the house leading to the lake, chasing a dark form down the stairway to the water where again the defendant was rendered unconscious by this form. As to this, the defendant testified:

> "Q. Well, will you describe it in more detail, then?
>
> A. My recollection is that it was a good sized man. I felt that it was a man.
>
> * * * * *
>
> Q. And I mean by that, Doctor, not what you felt but what you actually know.
>
> A. It was a form that seemed to me to be relatively good sized, evidence of a large head with a bushy appearance on the top.

Q. And when did you determine that it had a head, Doctor?

A. At that time, I would say, was the first time I could be absolutely sure that—

Q. At what time?

A. At the time that I saw the form going from the landing down to the beach." (R. 6581-82.)

The defendant testified further on cross examination:

"Q. Did you have the feeling that this form was the thing that was responsible for your wife's death?

A. Yes, sir, I did.

Q. And you don't know whether you struck at it or not?

A. I don't know for sure. My feeling was to tackle it or get a hold of it and bring it down, and then do what I could.

Q. Well, now, after you came through—or came to, rather, and you found yourself down on the beach, with water washing up on you, what did you do then?

A. Well, I very gradually came to some sort of sensation, staggered to my feet and started to eventually ascend the stairway to the yard and to my home.

Q. And when you came to on the beach, did you see anything of this form?

A. No, sir, I didn't." (R. 6585.)

The defendant further testified that he came up from the beach into the house and went upstairs, turned on no lights in the bedroom, examined his wife and determined that she was gone and that he then went downstairs and later called Mayor Houk.

In their new and revised brief, the defense set forth the statement made by the defendant on July 10th, 1954, which was a self-serving declaration and included state-

ments of fact subsequently admitted by the defendant to be false. Omitted from their brief entirely is the testimony of the defendant on the trial of this cause, his testimony at the inquest, and his statements made to Detectives Schottke and Gareau, to the Bay Village police officers, to the Coroner and to the numerous other witnesses who appeared and testified at the trial.

Concerning the testimony and the demeanor of the defendant on the stand, the Court of Appeals, after examining the entire record, said:

> "During the time he was under cross-examination the defendant gave evasive answers such as 'I can't recall' or 'I can't remember,' approximately 216 times to questions concerning facts and circumstances that took place in his claimed presence material to the issues in the case." (App. Br., App. p. 57a.)

That the defendant was in that home at the time Marilyn Sheppard was murdered is clear beyond all doubt, and the evidence is clear beyond a reasonable doubt that no human being other than the defendant had the exclusive opportunity to commit this murder. On cross-examination of Chief of Police John Eaton, counsel for the defense brought out the testimony that the Chief and Detectives Schottke and Gareau of the Cleveland Homicide Squad all agreed that (1) "There was no evidence of anybody else being there"; and (2) "We could not find anything to substantiate his (the defendant's) story" (R. 2875-2876.) Chief Eaton also testified that "this bushy haired man" did not show up in the defendant's story until a couple days after the murder (R. 2861).

There was evidence of a set up of burglary in that home but even this idea of a burglar, though urged by the

defendant's counsel during the trial, was finally abandoned by counsel in their argument to the jury when they said:

> "Well, of course, we don't claim there was a burglary. I mean I don't know why the intruder was there. We claim there was a man there, but whether he was there for a burglary or not, I don't know. We never claimed that he was." (R. 62 Supp.)

If there wasn't a burglar in that home that night, and the defense finally conceded that they weren't claiming there was a burglar in there, who put the watch, ring and key chain in that green bag? The defendant had been wearing these items and he made no complaint to anyone in his conversations on the morning of July 4th that the "form" took his watch, ring and key chain. Someone set it up to make it look as though a "burglar" entered that home and committed this murder, and who other than the defendant would simulate a burglary; who, other than the defendant would have reason so to do; who, other than the defendant had the time and the exclusive opportunity to set up this evidence of a burglary? Certainly it is not reasonable to believe (and the jury were concerned with the reasonableness of his story) that an intruder after committing this foul murder would hang around downstairs to ransack and wipe off fingerprints, knowing that the defendant was in the home and was an eye witness to his deed.

The defendant's watch had stopped at 4:15 (R. 3026, 3581). The Coroner testified that Marilyn was killed between 3:00 and 4:00 a.m. What was the defendant doing in the hours that elapsed between the time his watch stopped, his wife was killed, and 5:50 a.m. when he called

Mayor Houk, who was the first one he informed as to what happened to Marilyn? For some time prior to 4:15 a.m. and before 5:50 a.m. this defendant had the place all to himself.

Let us see whether the evidence excludes the hypothesis that a burglar did the killing, because if it does, then the only person left in that home to commit this crime was the defendant. There was no evidence of a forcible entry into this home and if a burglar entered the back door which the defense without support in the evidence claim may have been unlocked at the time of the murder, the defendant's own statement that he was lying sleeping on the couch until he heard his wife scream makes it absolutely clear that the intruder could have burglarized the place (all of the evidence of the ransacking was downstairs), gotten what he wanted and gone away without having to go upstairs to kill the defendant's wife to accomplish the burglary. The evidence shows that all that the "burglar" got was a green bag from a desk in the defendant's den, and later took the defendant's watch, ring and key chain and then the "burglar" threw those items away. There was no evidence in this case that it was necessary to go upstairs to murder this woman to secure the defendant's wrist watch, key chain and ring. He had those on his person. And what would a burglar want with a key chain? Was it reasonable for the jury to conclude that an intruder came into that home and murdered this woman in order to obtain the items found in the bag?

From the evidence in this case, the jury were justified in concluding as a matter of fact that it was too unreasonable to believe that an intruder would have spared this

powerful man lying downstairs in full view of anyone who may have entered that door, and go upstairs and kill the wife in order to ransack the downstairs portion of the home. This strange "burglar," contrary to what is the custom of "burglars," chose to kill Marilyn rather than to get away with the defendant's valuables. And a strange way this "burglar" had of ransacking. He pulled out some drawers in a desk and then neatly stacked those drawers aside the desk. He pulled out the drawers of another desk in the living room but did not disturb the contents of those drawers. There was money in the defendant's wallet, which he had on his person, and money in various places in the house which this burglar did not take. He searched for this green bag which was in a drawer in the defendant's desk in his study in order to carry out of that house three small items, namely, the defendant's watch, key chain and ring, all of which the "burglar" could have put in his pocket and made a quick getaway, if he really wanted those items. And this "burglar" evidently did not want these items because he threw them away. They were found in the weeds on the hill leading to the beach.

Then again, this "burglar" did another strange thing —here is a "burglar" up in that bedroom bludgeoning this defenseless woman to death, the defendant appears on the scene and appears so late that the "burglar" has had an opportunity to get in some 35 blows on this woman's skull and body with a deadly weapon. The "burglar" then becomes highly considerate of the defendant who surprises him in the commission of this crime, and only "clobbers" the defendant—not with the same deadly weapon—the blow to the defendant was a fist blow. If an intruder

walked into that home and into Marilyn Sheppard's bedroom and beat her with such maniacal fury with some kind of deadly weapon, why did he not also kill her husband, the only eye witness to his deed? The supposition that this "burglar" could not and would not inflict one single mortal or serious wound on this defendant (the defendant was discharged from the hospital four days after the murder and attended his wife's funeral the day prior to his discharge) while he was able at the same time to inflict mortal wounds on this defenseless woman, is unreasonable and beyond belief. The jury were justified in finding from that part of the evidence offered by the defendant in his story as to what happened in the bedroom that any wounds the defendant claimed he had were either self-inflicted or inflicted by Marilyn.

Nor is there any explanation offered by the defendant as to how it could be that this "burglar" or intruder would beat this woman to death with a formidable weapon to secure the defendant's wrist watch, key chain and ring which were on his person that night. Marilyn's rings were still on her fingers when she was found, so this "burglar" was not murdering her to secure any of her valuables. Marilyn's wrist watch was found in the defendant's study in the same location as was the green bag, so this "burglar" did not take that watch. And, obviously, no burglar would have had to murder her in order to take any valuables such as found in the green bag. The evidence conclusively established that they came from the person of the defendant.

Wasn't it reasonable for the jury to conclude that no intruder entered this home that night, and that since

there was evidence of a fake burglary, that the defendant set up this fake burglary to divert suspicion from himself as his wife's murderer? There is no other reasonable hypothesis left under all of this evidence, as to who did this deed except that it was done by the defendant. Every other reasonable hypothesis is excluded by the evidence.

Beyond a reasonable doubt, no one but the defendant, her husband, had the exclusive opportunity and the time to kill this woman in the manner that she was murdered. There could be no motive for fabricating evidence such as the burglary set up other than the defendant's own guilt of the homicide, and no outsider had the opportunity and the time, nor the motive, to fabricate a burglary in that home.

The evidence in this case is undisputed that on the night of July 3rd after the departure of the Aherns from the Sheppard home, there were three living persons remaining there, Marilyn, Chip, and the defendant. At the time of the arrival of Mr. and Mrs. Houk, the first persons to appear on the scene that morning, two of the persons, Chip and the defendant, were still alive, and Marilyn was dead. Chip was sound asleep. It is significant to note that when the Houks arrived, the defendant was offered and refused a drink of whiskey because he "wanted to keep his senses." For what? So that he would not get confused on the story that he had concocted before the Houks arrived as to how he would explain this murder?

Thereafter, upon being asked what had happened, the defendant told a fantastic and wholly incredible story. We have heretofore quoted portions of his testimony at the inquest and at the trial, what he told Coroner Gerber

and what he told the police officers and his story in his written statement (State's Exhibit 48) was in substance as follows:

The defendant said he was lying on the couch in the living room watching television and fell asleep; that he heard his wife cry out or scream, at which time he ran upstairs and charged into their bedroom and saw a form with a light garment (R. 3621). At that time he grappled with something or someone and was struck down. He said, "It seems like I was hit from behind somehow but had grappled this individual from in front or generally in front of me." The next thing he knew he was gathering his senses while coming to in a sitting position next to the bed and recognized a slight reflection on a badge that he had on his wallet. He picked up the wallet and "came to the realization" that he had been struck.

He said he looked at his wife and believed that he took her pulse and "felt that she was gone"; that he instinctively "ran" into his youngster's room and determined that he was all right. After that, he thought he heard a noise downstairs and went down the stairs as rapidly as he could, rounded the L of the living room and saw a "form" progressing rapidly. He pursued this form through the front door, over the porch, out the screen door and down the steps to the beach house landing and then on down the steps to the beach. The defendant said he then lunged or jumped and grasped this form in some manner from the back, "either body or leg, it was something solid" (R. 3623) and he "had a feeling of twisting or choking and this terminated my consciousness."

The defendant said that the next thing he knew he came to a very groggy recollection of being at the water's edge on his face, being wallowed back and forth by the waves; that he didn't know how long it took but he staggered up the stairs toward the house and at some time came to the realization that something was wrong and that his wife had been injured. He went back upstairs and looked at his wife, felt her, checked her pulse on her neck and determined that she was gone.

After determining that his wife "was gone," he said he believes he paced in and out of the room and "may have re-examined her"; that he went downstairs, "searching for a name, a number or what to do." He said, "A number came to me and I called, believing that this number was Mr. Houk's." (R. 3624.)

He said that the Houks arrived shortly thereafter and during the period between the time that he called them and their arrival, he paced back and forth somewhere in the house. He went into the den either before or shortly after the Houks arrived. At this point in his story, the defendant volunteered: "I didn't touch the back door on the road side to my recollection." Shortly after the Houks arrived, the defendant said one of them poured half a glass of whiskey and told him to drink it and he refused to drink because he was trying to recover his senses. He said then, "I soon lay down on the floor," and Mr. and Mrs. Houk went upstairs.

The evidence established that when the Aherns left that home, the defendant was lying on the couch with a jacket on, a T-shirt, and his wrist watch and the jury were justified in concluding that the defendant, before going

up to that bedroom that night, was fully awake and knew what he was doing. His jacket that he had been wearing while lying on that couch was found neatly folded on the couch. He offered no explanation on the trial as to when he removed that jacket, other than a vague recollection (as all of his recollections were vague and misty) that he may have taken it off while sleeping there, nor did he offer any explanation at any time as to what was done with his T shirt. The evidence established that he could not have had this jacket on when he started upstairs and later pursued this phantom out of the house and down to the water, because the defendant claims that he lay in the water for an unknown period of time and, as we say, the jacket was found dry and neatly folded on the couch where he had been sleeping, and had no blood on it.

It is only the defendant's story, incredible as it is, that he heard Marilyn scream while he was downstairs and that he then rushed up to the bedroom to get hit only with a fist while his wife was being murdered with a deadly weapon. And the jury was not required to believe that story. It was not incumbent upon the State to prove how this defendant was dressed or undressed when he was in that bedroom in order to prove that he murdered his wife. Nor was it incumbent upon the State to prove that the defendant was in a certain position or was standing at a certain spot in relation to the victim when he wielded that weapon and murdered this woman. There was no eye witness to this murder being committed by the defendant in that bedroom.

It is a fact that he took his jacket off downstairs before proceeding up to the bedroom, and that circumstance

discounts his story that he was roused from his sleep and immediately rushed upstairs in a daze. There is no evidence as to what, if any, clothing he had on himself when he was in the bedroom and proceeded to bludgeon his wife to death. Whether he had his trousers and other clothing on or off at that time only the defendant would know. Whether he had his T shirt on or off at that time only the defendant would know. It is a fact in the evidence that the defendant has not accounted for the T shirt he was wearing when the Aherns left the house, and that circumstance shows that his story was not true that he went up to that bedroom from the couch, fully clothed, and was immediately "clobbered" by some unknown form.

It is argued at page 60 of the brief of the defense that a member of this Court suggested that perhaps the defendant was not wearing his trousers at the time of the murder. The defense then state: "This suggestion is satisfied by the fact in evidence that there was a blood spot on the left knee of the trousers. This was at about the height of the mattress of the bed which was soaked with blood. The defendant readily stated that he had leaned over his wife when he ascertained that she was dead. It is reasonable to infer that this spot of blood on the knee was then made." It by no means follows from that argument by the defense that the defendant had his trousers on at the time he was murdering his wife. The evidence only shows that the defendant had his trousers on when he made a trip down to the water after the murder. It was following his trip to the water that he went back into the bedroom and claimed he made an examination of his wife. His trousers were wet at that time and there was evidence of water on

the floor in that bedroom and by the bed. Here, again, it was not incumbent upon the State to prove precisely how the defendant got the large blood stain on the knee of his trousers. The jury had a right to take into consideration the fact that he had this blood stain on his trousers in determining whether his story of rushing upstairs and being "clobbered" was true. Nor was the jury required to believe his explanation of how the blood may have gotten on his trousers.

Further, the defendant gave the same explanation as to how the blood may have gotten on his wrist watch, namely, when he made the examination of his wife and ascertained that she was gone. The only conclusion to be drawn from that explanation of the defendant as to how he got the blood on the watch was that he must have gotten it on after he went down to the lake because if it was on there before he made that trip to the water, it would have been washed off. And, we come again to the inescapable conclusion, and the only conclusion the jury could draw, no matter what the explanation of the defendant was as to the circumstances showing that he had a bloodstain on his trousers and blood on his watch, that the defendant was still wearing his watch when he came up from the lake.

The jury were justified in concluding that there was no one up in that bedroom murdering this woman but the defendant. Other than the appearance of the bed and of the victim as she lay on that bed, there was no sign of any struggle having taken place in that room with any intruder.

The victim's rings were still on her finger so no "burglar" had been in that room murdering her for her valuables. There was no evidence that she had been sexually attacked. Further, the evidence established that no one but the defendant had the opportunity and the time to remove the victim's wrist watch from her wrist, and that this watch was not removed from her wrist until some time after the murder. The evidence clearly established that the victim's wrist watch had remained on her wrist for some time after the murder because the blood had dried and left an imprint of her wrist watch band (a bracelet band) on her wrist. This was the watch found in the defendant's den in the same location as was the green bag originally.

No one but the defendant had the time and the exclusive opportunity to remove the object from the pillow on the victim's bed which the evidence clearly established had lain there for some time after the murder because the blood on it had dried and left an outline of some kind of instrument on that pillow. The jury were justified in concluding from this evidence that the defendant was the only one in that house who had the time and opportunity to remove that instrument from that pillow. What he did with the weapon only the defendant knows. It was not incumbent upon the State to prove what kind of weapon he used or what happened to the weapon. The maid testified that there was nothing missing from that room. The weapon was not found which leads to the conclusion that whatever weapon was used was carried into that room and at some later time carried out of that room, and only the defendant had the opportunity to do that.

The defendant's wrist watch was found with moisture under the crystal and dried blood on it, in a green bag that had no blood on it. The dried blood was on the crystal and on the upper band of the watch. The jury were justified in concluding that it was the defendant and no burglar who placed that watch in this bag and after he came up from the water in an attempt to deceive and divert suspicion from himself.

The defendant gave three different versions as to how the water got into the crystal of his watch, after he was confronted with this evidence. He stated that a few days before July 4th that he had been playing golf with Otto Graham; that they were caught in a heavy downpour and at the time the water got into the crystal of the wrist watch (R. 3587). His next explanation was that he since recalled having inadvertently water-skied with his watch on "the past few days" and had noticed a great deal of moisture in the crystal (R. 3627). His third explanation was that on Friday night before this murder he went down to the water to help his brothers with their boat and his brother Steve shouted that he was getting water in his watch.

The defendant attempted to explain the blood on the watch by claiming that he must have gotten it on the watch at the time he took his wife's pulse at the neck. He told Coroner Gerber that when he came up to the bedroom the last time, he took her pulse at the neck (R. 2983, 3102, 3123). The watch, according to his own story, should have been gone by that time, if taken by the "form" down on the beach. He offered no explanation as to how the watch could have gotten into the green bag

other than that it must have been taken off him when he was unconscious.

In the Court of Appeals, the defense stated that:

> "With two minor exceptions there is no circumstantial evidence of any value whatsoever: (1) the water under the appellant's wrist watch crystal; (2) the loss of the shirt." (App. Br., C. of A., p. 348.)

In this Court the defense recognize this most incriminating evidence establishing the fact that there was water under the defendant's wrist watch crystal and dried blood on the watch. Because the only conclusion the jury could reach from this, coupled with the fact that the blood on his wrist watch had dried, was that the defendant himself placed that watch in the green bag after he came up from the water, some time after the murder, and that no "form" could have taken it off him in the bedroom when he was allegedly knocked out the first time, because there was water under the crystal of the watch.

According to the defendant's own story, before he could touch his wife in that bedroom, he got clobbered. If, after he came to, he touched her and got the blood on the watch then, no burglar could have taken the watch from him while he was knocked out the first time. The only other opportunity for a burglar to take the watch off his person was when he was down on the beach, knocked out the second time. If a burglar took the watch off the defendant down at the beach, the burglar would have had to go back to the house, search for the green bag, put the watch in the green bag, take it outside and throw it down the hill. No burglar or phantom had that green bag in his possession while he was being pursued down

to the beach by the defendant and threw it away at that time, since the watch could not have been in the green bag at that time because the only opportunity the burglar would have had to remove it from the defendant's person was down on the beach. And why would a burglar throw a bag among the weeds with these valuables in it, after knocking the defendant unconscious on the beach? He had every opportunity at that time to get away with these items.

Further, as stated, there was no blood on the green bag and the blood on the watch would have had to dry in order not to leave a stain on the bag. The jury could reasonably infer, therefore, that the watch of the defendant was placed in that bag some time after the murder, after the blood had dried on the watch, and no one but the defendant had that opportunity.

And strange it was that the defendant took his wife's pulse with his left hand, which necessarily follows as a fact if he got the blood on the watch by taking her pulse. And strange it was that the blood on the watch was on the upper surface of the watch where it could not reasonably be expected to be if gotten on there as a result of taking the victim's pulse.

When the defendant was pursuing this phantom down to the water, he told Officer Schottke that when he got to the landing at the beach house he does not know "if he jumped over the railing or if he ran down the steps." The jury could infer from this that such injuries as the defendant claimed he had resulted from a jump and fall.

And why was the defendant going down to that water with his wife lying brutally murdered, instead of sum-

moning help? The deed was done by that time, he knew that "she was gone" or at least needed help, and he knew he was only chasing a phantom, because according to his own story, he was pursuing only a "form." He went down to that water for some other purpose than to catch this form. The T-shirt that he had been wearing while he was lying on that couch has never been found and the jury were justified in inferring that that T-shirt was splashed with blood and that the defendant had a reason therefore for disposing of it. He claimed that he had not at any time that night washed his hands, but if he took his wife's pulse and as a result got blood on his watch, some blood would have gotten on his hand also. And if he got the blood on the watch after he came up from the water, no burglar, not even a "form" was around at that time.

There were bloodstains around the house. There was evidence of an attempt to remove fingerprints in that home. Who but the defendant had the opportunity after the murder to accomplish the removal of fingerprints?

The evidence shows that the defendant made no effort to summon help while he was up in that bedroom, which he could readily have done because there was a telephone on the night stand in that room. He made no effort to do anything to help his wife at that time. During the entire period of time when the defendant claims he heard his wife scream, to and including the time he returned to the house from the beach and again went upstairs to examine his wife, he turned on no lights in the house, according to his own testimony. Why? The evidence shows that there was a light switch at the bottom of the stairway as well as at the top of the stairway. If,

as he says, he heard Marilyn scream, why did he not immediately turn on the lights by flipping the switch at the bottom of the stairway? He went into that bedroom again to examine his wife after he returned from the lake, but turned on no light in that room at that time, according to his testimony. Why? And the defendant, according to his own story, although twice ascertaining that his wife "was gone," told the Houks and his brother, Dr. Richard, that something ought to be done for Marilyn. Why? He knew that she was dead when these persons arrived.

And who would have waited around that home until after the blood had dried and then removed that instrument from the pillow on the victim's bed, and the watch from her wrist, on which the blood had also dried and left an imprint of the bracelet? Who could possibly have done that except the defendant?

And in reaching its verdict the jury had a right to consider the evidence as to how this defendant may have been injured and to what extent, as well as his behavior and conduct after the murder, and his apparent lack of serious injury by reason of the fact that he returned to his osteopathic practice in less than a week after the murder.

The defense have ignored entirely the marital difficulties between Marilyn and the defendant. Ignored are the admitted relationships of the defendant with Julie Lossman, Margaret Kauzor and Susan Hayes, affairs of which Marilyn knew and which were conducive to bitterness, arguments, incriminations, and out of which anything might happen including this murder. Also ignored are the defendant's admissions that Marilyn had lost her "sexual

aggressiveness" (R. 6452-6510) and that "sexual relationship was painful" to her (R. 605). The defense also ignores the gifts of the defendant to Susan Hayes consisting of a ring, a wrist watch and a suede jacket, his correspondence with her and his living with her openly and brazenly before mutual friends of the defendant and Marilyn, at the home of Dr. and Mrs. Miller in California, while at the same time Marilyn was parked by the defendant 300 miles away at Monterey. Also ignored are the discussions of divorce of Marilyn by the defendant, testified to by Susan Hayes and Dr. Hoversten and the defendant's admission that Susan Hayes had asked him about a divorce (R. 6523).

Notwithstanding all of the foregoing, the defense keep parroting their assertion that it was a harmonious and happy married life.

With all of this evidence before them, the jury were fully justified in concluding that this defendant wasn't chasing any phantom down to the water. And the jury were justified in concluding that this defendant realized the seriousness of what was confronting him and set up this fake burglary to deceive anybody who might investigate.

The jury heard the defendant's varied stories at the inquest, to the police officers, in his written statement and on the trial, and observed his demeanor and attitude while testifying and being judges of the facts and of the credibility of the witnesses, and it being their province to weigh all of the evidence, evidently concluded that the stories were too unreasonable for belief and justifiably so.

So glaring in its absurdity, improbability and unreasonableness was that tale of the defendant in view of the

evidence in this case, that the jurors' minds must have recoiled when it was offered to them as the truth of what occurred in that home that night. His story defies common sense, and from the evidence, the jury were justified in concluding that it was too unreasonable to be worthy of belief. His account of what happened in his home that night was so incredible as to appear foolish.

We direct this Court's attention to the examination and discussion of the evidence made by the Court of Appeals, as follows:

"We go, therefore, directly to an examination of the evidence dealing with this question. It must be remembered that on appeal the court does not retry the issues of fact but is concerned only with whether there is sufficient and ample evidence to require a submission of the case to the jury and where a verdict has been returned, whether there is substantial evidence (without weighing such evidence) to justify the verdict.

"It is the claim of the state that the defendant and the defendant alone, caused the death of his wife. It is the contention of the defendant that a third person, or third persons, was or were in defendant's house on the morning of July 4th, who was or were responsible for her death. This, of course, is not by way of establishing a defense because the defendant has no such burden. It is enough if when weighing such evidence when fairly considered with all the other evidence in the case, the jury does not find the existence of the essential facts necessary to establish the defendant guilty beyond a reasonable doubt. It is the contention of the state that only three people were in the Sheppard house after midnight of the beginning of July

4th, that is, the 7 year old son of the parties, the decedent, and the defendant, and that all the circumstances as shown by the evidence point directly to defendant as the one who perpetrated the crime. Also, the claim of defendant's account of his encounters with the supposed intruder or intruders and his descriptions of him or them is so unbelievable as to give weight to the state's circumstantial case. On direct examination in his own defense the defendant testified in part as follows:

'A. The first thing that I can recall was hearing Marilyn cry out my name once or twice, which was followed by moans, load moans and noises of some sort. I was awakened by her cries and in my drowsy recollection, stimulated to go to Marilyn, which I did as soon as I could navigate.

Q. Now, just one question here. Did you have a thought in your mind at that time as to what caused Marilyn to cry out?

A. My subconscious feeling was that Marilyn was experiencing one of the convulsions that she had experienced earlier in her pregnancy and I ascended the stairway. As I went upstairs and into the room I felt that I could visualize a form of some type with a *light top*. As I tried to go to Marilyn I was intercepted or grappled. As I tried to shake loose or strike, I felt that I was struck from behind and my recollection was cut off. The next thing I remember was coming to a very vague sensation in a sitting position right next to Marilyn's bed, facing the hallway, facing south. I recall vaguely recognizing my wallet.

Q. Now, just a moment. At that point have you any way or can you determine—is there any way of determining the length of time between the time you were knocked out and when you came to this sitting position?

A. No, sir, no way that I know of.

Q. Now, I am handing you state's exhibit 27 and defendant's exhibit T. Is that your wallet?

A. Yes, sir, it is.

Q. When was the last time you had it in your hand before I handed it to you this morning?

A. It must have been that morning.

Q. That morning. Now, you say—what?

A. I may have had it in my hand at the inquest. I'm not sure whether Doctor Danaceau handed it to me or just held it.

Q. I see, but—

A. Mr. Danaceau—excuse me.

* * *

Q. Now, I have come to the point where you had awakened and saw the faint glow of your badge on the floor. Do you remember?

A. Yes, sir.

Q. Was there a light in the house anywhere?

A. Yes, sir, there was.

Q. That you remember?

A. There was a light.

Q. And where was that light?

A. I cannot say for sure, of my own knowledge.

Q. There was some kind of light?

A. Yes, sir.

Q. Now, then, after you awakened or came to consciousness, repeat, as best as you can, in your own words, to this jury what you saw and what you did.

A. Well, I realized that I had been hurt and as I came to some sort of consciousness, I looked at my wife.

Q. What did you see?

A. She was in very bad condition. She had been —she had been badly beaten. I felt that she was gone. And I was immediately fearful for Chip. I went

into Chip's room and in some way evaluated that he was all right. I don't know how I did it. I, at this time or shortly thereafter, heard a noise downstairs.

Q. And what did you do when you heard the noise downstairs?

A. And I—I can't explain my emotion, but I was stimulated to chase or get whoever or whatever was responsible for what had happened. I went down the stairs, went into the living room, over toward the east portion of the living room and visualized a form.

Q. Now, where was that form when you first visualized him?

A. Between the front door of the house and the yard somewhere.

Q. Now, are you able to tell the jury what your mental condition was when you came out of this—awoke from this attack?

A. I was very confused. It might be called punchy, in language that we use as slang. I was stimulated, or driven to try to chase this person, which I did. My—

Q. And when you saw the form, what did you do?

A. Well, I tried to pursue it as well as I could under the circumstances.

Q. And where did you pursue it?

A. Toward the steps to the beach at which time I lost visualization of this form.

Q. Was it dark?

A. Beg pardon?

Q. Was it dark? Dark?

A. Yes, sir, it was dark but there was enough light from somewhere that I could see this form.

Q. Yes, all right.

A. I descended the stairway and to the landing and I visualized the form going down, or as he came

on the beach. And it was at this time that I felt that I could visualize a silhouette that was describable. I—

Q. What happened on the beach?

A. I descended as rapidly as I could. I lunged or lurched and grasped this individual from behind. Whether I caught up with him or whether he awaited me, I can't say. I felt as though I had grasped an immovable object of some type. I was conscious thereafter of only a choking or twisting type of sensation, and that is all that I can remember until I came to some sort of very vague sensation in the water, the water's edge.

Q. Were you able to determine anything about that person?

A. Yes, sir.

Q. And what?

A. Well, I felt that it was a large, relatively large form; the clothing was dark from behind; there was evidence of a good sized head with a bushy appearance at the top of the head—hair.

Q. Now, then, when you came to the second time, just where were you?

A. I don't know exactly where I was. I was—

Q. Were you on the beach?

A. I was on the beach with—

Q. Where was your head and where were your feet?

A. My feet were in the water and my head was directed to the sea wall, toward the south, generally. I could have been slightly askew. The waves were breaking over me and even moving my lower part of my body some.

Q. What was the condition of light at that time?

A. Light?

Q. Light, yes.

A. It was light enough to see at that time. I could see Huntington Pier later when I came to enough sensation to see at all.

Q. Day was breaking, is that right?

A. I would say it had broken somewhat.

Q. Day had broken. What was your mental and physical condition as you remember it now, that you were in at the time that you came to consciousness on the beach?

A. My mental condition was that I was extremely confused. I didn't know where I was or how long I had been there, or my own name, for that matter.

Q. Do you know how long you lied on the beach before you got up?

A. No, sir, I don't.

Q. Well, you did get up to your feet?

A. I finally did.

Q. Do you know how you got up the steps? Do you have any recollection of that?

A. I remember, as I finally came to enough sensation to get to my feet, I rather staggered up the stairway and as I was going up, or as I was recognizing that this was my house, I entered the house and came to the realization that I had been hurt and that I had been struck by an intruder and I was then fearful for Marilyn although I can't say that I actually remembered of seeing her.

Q. You remember what?

A. I don't say that at that time I remembered seeing her the previous time upstairs.

Q. How was your mind working? Was there any blocking of your mental processes at that time?

A. The best I can explain is that my mind was working like a nightmare or a dream, very horrible dream.

Q. And then what did you do when you got in the house?

A. I eventually went up the stairs. I'm not sure just exactly how rapidly I went upstairs but I did finally go upstairs and it was at that time that I re-examined Marilyn.

Q. Was there enough light in her room then to see her?

A. Yes, sir.

Q. What did you see?

A. I saw that she had been terribly beaten.

Q. Did you determine that she was dead?

A. Yes, I thought that I did.

Q. What was your feeling at that particular time, if you had any feeling, that you remember?

A. I was horrified. I was shaken beyond explanation, and I felt that maybe I'd wake up, maybe this was all a terrible nightmare or dream and I walked around, paced, I may have rechecked little Chip. Very likely I did, but I can't say specifically that I did, and I may have gone back in to see Marilyn. As I recall—I could have passed out again, I don't remember but I was staggered. Finally I went down the stairs trying to come to some decision, something to do, where to turn. I must have paced and walked around downstairs trying to shake this thing off or come to a decision and I thought of a number and called it.

Q. What was the number you thought of?

A. I thought that the number was that of Mr. Houk's.

Q. Do you recall what you said to him over the phone?

A. No, I don't.

Q. Where was the telephone?

A. There are two phones downstairs. I'm not positive which one I used.

Q. And do you know how long it was, have you any recollection of the length of time between your telephone call and the appearance of Mr. and Mrs. Houk?

A. It seemed like a long time, but it evidently was a relatively short time.

Q. And do you know where you were or what you were doing between the time that you made the telephone call and the arrival of Mr. and Mrs. Houk?

A. I was walking through the house again and trying to—trying to clear my mind, trying to remember what had happened, trying to remember a description of this individual that I had seen, trying to differentiate whether there two people or one, in fact, almost thinking there were two. I, shortly before the Houks came, stopped in the kitchen and put my head on the table and that is the first time I recall realizing or recognizing that I had a very severe pain in the neck. Up to that time I may have been holding my neck but I don't remember. And at that time I felt that my neck was injured.'

"On July 4, at 11 A.M., the defendant made the following statement to Officer Schottke of the Cleveland Police Department as shown by the police report created July 7, 1954, which was received into evidence as 'State's Exhibit 49':

'Sir:

The following is the list of questions asked Dr. Sam Sheppard on the first time we questioned him on July 4, 1954:

Q. Will you tell us everything that you know about this?

A. He stated that the Aherns were visiting and that he fell asleep on the couch before they left. The thing he remembers is that he heard his wife screaming and he ran up the stairs and as he entered the room he thought he seen a form and at that time he heard someone working over his wife. He then was attacked and hit on the side of the head and knocked unconscious. When he regained consciousness he heard a noise downstairs and he ran downstairs and seen a form going out the door leading to the porch. He ran after this form and chased him down the stairs and when he got to the boathouse landing he doesn't remember if he jumped over the railing or if he ran down to the beach but he half tackled him and he struggled with him and was again knocked unconscious.

When he regained consciousness, he was on his stomach on the beach being wallowed back and forth by the waves. He then went up to the house and wandered around in a daze and went up and went up to his wife's room and attempted to administer to her and felt that she was gone. He then went downstairs and wandered around in a daze and finally a telephone number came to his mind and he called this number and it was Mayor Houk. He said that Houk came to his house and also his brother Richard and he was then taken to the hospital.

Q. Asked him to describe the screams.

A. Stated that they were loud screams.

Q. How long did the screams last?

A. Stated all the while he was running up the stairs.

Q. Asked him if the same person attacked him that he heard working over his wife.

A. Stated no, as he was under the impression that he was attacked by someone else at the time he heard someone working over his wife.

Q. Asked him how many times he was assaulted?

A. Stated two or three times at the most.

Q. With what were you assaulted?

A. He stated with fists.

Q. Asked him if he could describe the person that went out the door, if that person was white or colored?

A. He stated the person must have been white because the dog always barks at colored people. This person was taller than he was, he was about 6'3" and was dressed in dark clothing and was a dark complected white man.

Q. Asked him if he turned on any light at the time he looked at his wife in the bedroom.

A. He stated no.

Q. Asked him if there were any lights on in the house.

A. He stated he does not remember, he does not recall.

Q. Asked him how he could see to administer to his wife if he did not turn on any lights.

A. He stated he was able to determine there was nothing he could do for her and that she was gone.

Q. Asked him as to the condition as to light and darkness at the time he regained consciousness on the beach.

A. He stated it was a little lighter than dark.

Q. Asked him if the doors were kept locked in the house.

A. He stated the doors were never locked.

Q. Asked him if there was a great deal of money kept around the house.

A. Stated no, only about $60 or $70.

Q. Asked if any narcotics were kept in the house.

A. Stated no, but there may be a few samples in my desk.

Q. Asked him about Dr. Hoversten staying at his house and where he was at now.

A. He stated Dr. Hoversten was staying at his house for a few days but that he had left yesterday afternoon to keep a golf date at Kent, Ohio.

Q. Asked him if he had heard rumors to the effect that Dr. Hoversten was infatuated with his wife.

A. He stated that he had heard those rumors but he did not think anything about it and the rumors might be true.

Q. Asked him if he knew of any men that may have stopped at his home while he was at work.

A. He stated that several men have stopped but that his wife was faithful to him.

Q. Asked him if he could name any of them.

A. Stated that he could not think of any names right now.

Q. Asked him if he was running around with any women.

A. He stated no.

Q. Asked him if his wife was running around with any men.

A. Stated no.'

"Defendant talked with Coroner Gerber at the hospital at about 9 A.M. on July 4th. Dr. Gerber testified as to defendant's statement of the events of the morning of July 4th as follows:

'Q. Did you have a conversation with him?

A. Yes, sir.

Q. Now, will you please relate the conversation?

A. I asked him if he could tell me what happened, that is, I asked Dr. Sam Sheppard if he could tell me what happened. He said he would try to and his conversation was as follows:

That he was sleeping on this couch or davenport and that he thought he heard someone call him, "Sam." That he immediately jumped off the couch

and rushed upstairs. When he got to the head of the stairs something clobbered him on the back of the neck or head, and that he was rendered unconscious. He doesn't know how long, he stated, he didn't know how long he was unconscious but when he came to he thought he heard a noise in the living room. That he rushed back down the stairs to the living room and that he was—he thought that he saw some form going out of the doors toward the stairs that lead to the back. That he rushed after the form, and that when he got to the foot of the stairs that lead actually to the beach alongside of the boathouse or bath house, he got into a wrestling match or hassle with the form and that he was rendered unconscious again, and he woke up later and went back up to the house and then went into—up the stairs—went into the living room, up the stairs to the second floor and into his wife's bedroom and felt of her pulse at the neck; realized that there was something wrong with her, something seriously wrong with her, that she was probably dead. That he came back downstairs and some time later called Mayor Houk. I asked him if he could see this form as he went up the stairs from the couch. He said, "No, it was too dark to see." He couldn't see anything except a form.

I asked him if he could see the form going down the stairs to the beach. He said, "No, just a form. Just an outline." I told him I would not ask him any more questions and left. At the time that I was—he was talking to me and I was asking these questions, Dr. Richard Sheppard came in and another doctor of the hospital came in and took—this doctor, other doctor, took Dr. Sam Sheppard's blood pressure.'

"He also stated: * * *

'That he rushed after this form. He couldn't tell definitely what this form was, couldn't tell whether

it was a human being or whether it was a man or a woman, whether or not it had a hat on, whether or not he could see any hair, whether or not it had a coat or trousers on.'

"The foregoing was repeated at the inquest at Normandy School as shown on page 3101 of the record.

"On the afternoon of July 4th at about 3 P.M. the defendant was again questioned by Officer Schottke at which time he stated in part as was testified to by Officer Schottke:

'We then told him that there was blood on the band and on the crystal of the wrist watch, asked him if he could tell us how the blood got there. He stated that he remembered that at the time that he regained consciousness in the upstairs bedroom that he had felt his wife's pulse at the neck and felt that she was gone and at that time he must have gotten the blood on the wrist watch and he heard a noise downstairs and ran downstairs.'

"On July 10th defendant went to the sheriff's office at the request of the authorities where a full written statement was made which was in part as follows (State's exhibit 48):

'* * * I evidently became very drowsy and fell asleep. I recall wearing summer cord trousers, a white T shirt, moccasin type loafers with no shoestrings, I am not sure of the socks. I don't know whether I had removed my brown corduroy coat that I had put on earlier, or whether I did at this time or not. The next thing that I recall very hazily, my wife partially awoke me in some manner and I think she notified me that she was going to bed. I evidently continued to sleep. The next thing I recall was hearing her cry out or scream. At this time I was on the couch. I think that

she cried or screamed my name once or twice, during which time I ran upstairs, thinking that she might be having a reaction similar to convulsions that she had had in the early days of her pregnancy. I charged into our room and saw a form with a light garment I believe. At the same time grappling with someone or something. During this short period I could hear loud moans or groaning sounds and noises. I was struck down. It seems like I was hit from behind somehow and had grappled this individual from in front or generally in front of me. I was apparently knocked out. The next thing I knew I was gathering my senses while coming to a sitting position next to the bed, my feet toward the hallway. In the dim light I began to come to my senses and recognized a slight reflection on a badge that I have on my wallet. I picked up the wallet and while putting it in my pocket came to the realization that I had been struck and something was wrong. I looked at my wife. I believe I took her pulse and felt that she was gone. I believe that I thereafter instinctively or subconsciously ran into my youngster's room next door and somehow determined that he was all right. I am not sure how I determined this. After that, I thought I heard a noise downstairs, seemingly in the front eastern portion of the house. I went downstairs as rapidly as I could coming down the west division of the steps. I rounded the L of the living room and went toward the dining table situated on the east wall of the long front room on the lake side. I then saw a form progressing rapidly somewhere between the front door toward the lake and the screen door. I pursued this form through the front door, over the porch and out the screen door and then on down the steps to the beach, where I lunged or jumped or grasped him in some manner from the back, either body or leg, it was something solid. However, I am not sure. This was beyond the steps an unknown distance but probably about ten feet. I had the feeling of twisting or choking and this terminated my consciousness.

The next thing I know I came to a very groggy recollection of being at the water's edge on my face, being wallowed back and forth by the waves. My head was toward the bank, my legs and feet were toward the water. I staggered to my feet and came slowly to some sort of sense. I don't know how long it took, but I staggered up the stairs toward the house and at some time came to the realization that something was wrong and that my wife had been injured. I went back upstairs and looked at my wife and felt her and checked her pulse on her neck and determined or thought that she was gone. I became or thought that I was disoriented and the victim of a bizarre dream and I believed I paced in and out of the room and possibly into one of the other rooms. I may have reexamined her, finally realizing that this was true. I went downstairs. I believe I went through the kitchen into my study, searching for a name, a number or what to do. A number came to me and I called, believing that this number was Mr. Houk's. I don't remember what I said to Mr. Houk. He and his wife arrived there shortly thereafter. During this period I paced back and forth somewhere in the house, relatively disoriented, not knowing what to do or where to turn. I think I was seated at the kitchen table with my head on the table when they arrived but I may have gone into the den. I went into the den as I recall, either before or shortly after they arrived. The injury to my neck is the only severe pain that I can recall. I should say, the discomfort to my neck. I didn't touch the back door on the road side to my recollection. Shortly after the Houks arrived, one of them poured a half glass of whiskey as they knew where we kept a small supply of liquor, and told me to drink it. I refused,

since I was so groggy anyway. I was trying to recover my senses.'

"The defendant's statement of the facts as above set forth are to be found with some discrepancies, variations or omissions, in the testimony of other witnesses when called to tell what the defendant told them when questioned on the subject. The first declarations of the defendant were made to Mayor Houk who arrived at the Sheppard home shortly before 6:00 A.M. on July 4th in response to the defendant's call. The mayor testified the defendant said:

'My God, Spence, get over here quick, I think they have killed Marilyn.'

"He further testified that he went immediately to the Sheppard home and found the defendant in the den, and

'I immediately went up to him and asked him what happened, words to that effect, and he said, "I don't know exactly but somebody ought to do something for Marilyn," and with that my wife immediately went upstairs and I remained with Dr. Sam and I said something to the effect of "get hold of yourself" or something like that "can you tell me what happened?" and he said, "I don't know. I just remember waking up on the couch and I heard Marilyn screaming and I started up the stairs and somebody or something clobbered me and the next thing I remember was coming to down on the beach." And that he remembered coming upstairs and that he thought he tried to do something for Marilyn and he says "that's all I remember." '

"Officer Drenkhan who received a call from Mayor Houk at 5:58 A.M. and who got to the Sheppard home at 6:02 A.M. stated on direct examination as to what the defendant said as to his actions when awakened by Marilyn's screams:

'A. I asked the defendant what had happened. He said that he heard Marilyn scream that he remembered fighting on the stairs that he was in the water and then he came upstairs.'

"Mrs. Esther Houk, wife of the mayor of Bay Village, who accompanied her husband to the Sheppard home, after going upstairs and viewing the revolting sight in the Sheppard bedroom, returned to the kitchen and poured out half a glass of whiskey and offered it to the defendant with the statement 'this might help you.' The record then discloses the following testimony by Mrs. Houk:

'A. He said, "No, I don't want it. I can't think clear now and I have to think."

Q. And he did not take the drink?

A. I asked him "shouldn't this help?" but he is a doctor, he should know and he said, "no." So he didn't take it.

Q. I see. Then what occurred from the den?

A. I believe he was talking.

* * * * *

Q. What did he say?

A. He complained of his neck. He said he thought it was broken. He mentioned kidding Steve about locking his house so tight. He said he remembered being hit at the top of the stairs and either he was chasing someone or someone was chasing him down the stairs. I remember that, because I couldn't picture anyone chasing him * * *.'

"The defendant's brother, Dr. Richard Sheppard, arrived shortly after Mr. and Mrs. Houk and Officer Drenkhan and after viewing Marilyn, returned to the den.

Mayor Houk then testified that he heard the following conversation:

> 'Dr. Richard bent over Dr. Sam and I heard him say that "she is gone, Sam," or words to that effect, and Sam slumped further down in his chair and said, "Oh, my God no" or words to that effect. And I then heard Dr. Richard say either "did you do this?" or "did you have anything to do with this?" and Sam replied, "Hell, no." '

"Shortly after the foregoing conversation with defendant by those who first came to his house, Dr. Stephen Sheppard arrived with a doctor from Bay View Hospital (about 6:15 A. M.) and without consulting authorities, took the defendant to Bay View Hospital.

"On the following day, Dr. Hoversten testified about a call he made upon the defendant to the hospital, when he heard the following conversation between the defendant and Dr. Stephen Sheppard:

> 'A. Yes, I remember I was sitting on the left hand side of the bed and Steve sat near the foot of the bed and he advised Dr. Sam to go over in his mind several times a day * * * As I recall Dr. Steve addressed Dr. Sam and said in words to this effect: "You should review in your mind several times a day the sequence of events as they happened so that you will have your story straight when questioned" and then he gave as an example "you were upstairs and you went downstairs and from here to here," and so forth.'

"An examination of the foregoing evidence shows that as successive inquiries were made of the defendant, his answers changed considerably. His first statement shows that he did not reach the top of the stairs before encountering someone or a form. No mention is made about 'Chip' until the statement was made at the sheriff's office on July 10th. Likewise, the statements do not suggest that defendant examined the decedent on his first responding to her call, until after the green bag containing defendant's watch, ring and keys were found with blood on the crystal and band of the watch and such fact was called to his attention. There could be no possible way under the sequence of events as testified to by the defendant in which blood could have gotten on the watch unless it got there before the defendant had his alleged encounter on the beach.

"When the defendant fell asleep on the couch in the living room on the evening of July 3rd he (by his own testimony) was wearing a T shirt, pants, loafers and a corduroy jacket. When the Houks arrived at 5:45 A. M. on July 4th defendant was bare from the waist up and in his statements claims no recollection of what happened to the T shirt. The T shirt has never been found or accounted for. Chief of Police Eaton when he arrived at 6:30 A. M. of July 4th saw the corduroy jacket neatly folded on the couch where defendant had been sleeping and Officer Drenkhan had noticed the jacket in the same position upon his arrival at 6:02 A. M. No one of those who arrived at the Sheppard home prior to the Chief of Police, testified as to having moved or touched the jacket. The defendant is not sure but says he has a faint recollection of having removed it while sleeping because he was too warm. Dr. Stephen Sheppard testified having observed the jacket on the floor. This was prior to 6:30 A. M. However, when the photograph was taken at 8 A. M. the jacket was still in the position as observed by Officer Drenkhan and Chief Eaton.

"The officers who first arrived on the premises made a complete investigation of the house for evidence of any forcible entry, and found all windows and screens locked, untouched and in place, the screens being fastened from the inside and no damage was observed to any of the doors. Defendant testified that the doors of his home were never locked. However Mrs. Ahern testified that before she left at midnight on the morning of July 4th, she locked the door and chained it on the lake side of the house and the maid testified of being locked out on one or more occasions when she came to work in the morning. She also testified that it was the practice to leave the street door unlocked on the mornings she was to report for work, which was on a fixed day each week. This testimony is supported by that of Dr. Hoversten who said that the first day he visited there in July when he came home at about midnight, Marilyn called down to him not to lock the door because the maid was coming in the morning. The record clearly shows the maid was not expected on July 4th.

"Officer Drenkhan testified that he patrolled Lake Road during the night beginning about 11 P. M. and continuing until 5 A. M. passing the Sheppard home on several occasions, and noticed no one on the highway at or near the Sheppard home. He also examined the beach at the bottom of the steps by the beach house shortly after 6 A. M. and found no foot prints in the sand. Defendant produced two witnesses, one of whom reported that while driving east on West Lake Road at about 2:15 A. M. on July 4th he saw a big man over six feet tall and weighing 190 pounds standing in the Sheppard driveway wearing a light T shirt but was unable to describe the rest of the dress. He testified that the stranger had a crew hair cut and was a

bit tanned and that all this was observed in the dead of night while returning from a fishing party at Sandusky, Ohio. The witness had a boat attached to his automobile and testified he was driving 35 miles per hour when he observed the stranger in the drive near three maple trees. The other witness claims to have been driving west at about 4 A. M. when he observed a stranger near the cemetery which is just west of the Sheppard home. He described the stranger as having a crew haircut, was 5'9" tall and had bulging eyes and was wearing a white shirt. Neither of these witnesses came forward until a reward was offered publicly six or seven days after July 4th although the story of Marilyn Sheppard's death had received great publicity, including the story that defendant had met with a form with bushy hair in the Sheppard home after he heard his wife scream for help.

"Defendant's testimony was given in support of his claim that his home life and that of his wife was loving and harmonious. As opposed to this evidence, Dr. Hoversten testified to conversation in which the witness read and discussed with defendant a letter which defendant had written and which he intended to mail to his wife, on the subject of divorce. The same subject was talked over on several occasions and there is some evidence that the defendant discussed this subject with Susan Hayes. There is also evidence that after Chip was born Mrs. Sheppard was not sexually aggressive and that she had consulted with defendant's brother Dr. Stephen Sheppard on the subject and its effect on her relationship with her husband (the defendant). Defendant admitted meeting with one of his lady patients, *at her insistence and request* on several occasions, taking her to Metropolitan Park on at least one occasion where they kissed each other and being in-

volved in an altercation between the lady and her husband about her attentions to defendant in Mrs. Sheppard's presence on a boat trip to Detroit. He called and was in company of another young lady in California while his wife was in Cleveland. His intimate relationship with Susan Hayes for more than a year was admitted by defendant including his cohabiting with her at the home of Dr. Miller in California for about a week although when first questioned he denied any such affair and upon the coroner's inquest under oath he testified untruthfully on the subject by denying such intimacy.

"When the officers arrived at the Sheppard home on the morning of July 4th they found a medical bag of defendant open and on its end with some of the contents spilled on the floor. Some of the drawers in the desk in the library were pulled out and piled on the floor and the tools for defendant's outboard motor, which defendant kept in a green cloth bag in the desk, were on the floor in front of the desk, together with a broken statue. There was also a green box containing fishing tackle on the floor near the tools. Marilyn Sheppard's wrist watch with dry blood on the band was lying on the floor near the desk. The contents of one drawer had been spilled out after Dr. Richard Sheppard accidentally kicked it over. The drawers in the desk in the living room were partly pulled out but the contents thereof were undisturbed. The lid or cover of the desk was open and resting on the back of one of the upholstered living room chairs. There were some sales tax stamps and papers scattered about on the floor near the desk.

"The Cleveland police department fingerprint expert testified that there were no readable fingerprints on the desks or in other places about the house; that they had

been wiped off or smudged, and on some of the furniture surfaces he found long scratches as if the surfaces had been wiped with sandpaper or a rough cloth of some kind. This was equally true of the metal fishing box and drawers piled in the den.

"The picture of Mrs. Sheppard's left wrist showed an impression of the wrist band of her watch in dry blood, as if the watch had been pulled from her wrist after the blood had dried about the wrist band. About 1:30 P. M. the afternoon of July 4th, the mayor's son, while searching the bank which extends down to the lake in front of the Sheppard home and which is covered with very heavy brush, found the green cloth bag containing the defendant's wrist watch, which had stopped at 4:15, with dry blood on the band and crystal and also containing his class ring and key chain. The hour at which the watch was stopped was 15 minutes after the latest time fixed by the county coroner as the time Marilyn Sheppard came to her death (between 3 and 4 A.M. on July 4th). There was no blood on the bag and there is no dispute but that the green bag was the one used by defendant to hold his outboard motor tools and that he kept them in his desk in the den.

"There was over $200.00 found in various places about the house including defendant's wallet which contained $63.00 and a check for a large sum of money, all of which was easily discovered by the Chief of Police. Defendant testified that he discovered his wallet which had been in his pocket, on the floor beside him after he came to in the bedroom. Except for the green cloth bag, defendant's watch, ring and key chain, there is no evidence that anything was missing from the Sheppard home.

"Defendant in his argument to the jury said:

> 'Well, of course, we don't claim there was a burglary. I mean I don't know why the intruder was there. We claim there was a man there but whether he was there for burglary or not I don't know. We never claimed that he was.'

"The evidence of the somewhat disarranged condition of the first floor of the house would tend to show the presence of an intruder, but if because of the manner in which it was done and the other surrounding circumstances no such conclusion could be reasonably drawn from the evidence, such condition would give strong support to the State's case. The defendant also argues that decedent came to her death at the hands of a sex maniac by whom defendant was 'clobbered' in his bedroom or on the stairway to the second floor, and on the beach. It would be difficult to believe that a sex maniac, after discovery, would take time to set up the appearance of a burglary, or that a burglar would throw away the only property found to have been taken from the house, the green cloth bag containing defendant's wrist watch, ring and key chain.

"It is also hard to believe that a burglar would not have found and taken defendant's wallet which he says was on the floor beside him after he encountered the form in the bedroom, and after monies that were about the house, or that either a burglar or a sex maniac would take time or go to the trouble of destroying fingerprints after the defendant was aroused from his sleep, or that such person, armed with a blunt instrument, would go about his intended purpose without molesting the defendant whose presence asleep on the couch could not have been missed.

"When the defendant went to sleep on the couch the green bag containing the tools was in the desk and the defendant was wearing his wrist watch, ring and key chain.

"By defendant's own testimony, when responding to his wife's screams for help, he did not turn on the lights either on the stairway while on his way to the bedroom, or in the bedroom. Light switches were conveniently placed for that purpose. That it was then in the dead of night is clearly shown because when he was following the form to the beach he said it was dark, with some reflection from Cleveland, and after coming to and starting back to the house, he testified the day was just breaking. The discovery by defendant that his wife had been so badly beaten 'that he felt she was gone' particularly when he returned from the beach and made as he claimed, his second examination of her; that he should do so without light, is a fact which the jury had the right to consider, together with all of the other evidence of his conduct and the surrounding physical facts, in determining the credibility to be given his story. Even though day was breaking, the evidence was undisputed that the window shades were drawn in the murder room, except as to one window which was up six inches to let in air. There is evidence in the record by a neighbor that she drove by the Sheppard home at 2:35 A.M. on July 4th and saw two lights burning, one on the first floor toward the east side of the house, and one on the second floor.

"No mention is made by defendant about the family dog, although he testified that the intruder must have been white, because a dog always bark at colored people. The defendant did not hear the dog bark or at least he gave no testimony to that effect.

"One significant fact to be considered is the passing of time between the time of Marilyn Sheppard's death and the time defendant summoned help and what all the activities were that engaged the defendant's attention during that period.

"The coroner fixed the time of death as between 3 and 4 A.M. on July 4, 1954. The first call by defendant asking for help was made between 5:45 A.M. and 5:50 A.M. of that day. The defendant testified that when he followed the form to the beach, it was in the dark of night with some reflection of light from Cleveland. At the time he came to on the beach, he testified that it was at about the break of day. It is a matter of public information that on July 4, 1954, the sun rose at 4:58 A.M. Eastern Standard time or 5:58 A.M. Eastern Daylight Savings time. The break of day precedes sunrise by about forty minutes. So that either between the time of death fixed by the coroner, at which time defendant testified he was in the bedroom where decedent died, having responded to her call for help, and in his testimony expressed the belief that she was then gone, or from the time defendant started from the beach to the house after encountering the form there (defendant's testimony being the only authority for this fact) from forty minutes to two hours passed. There is little or no attempt to account for defendant's actions during this period. It is also true that there were neighbors on both sides who were not disturbed. They were much closer in point of distance to the defendant than was Mayor Houk.

"The evidence shows also that there was a telephone between the twin beds in the murder room which was not used by defendant to call help after he regained consciousness from his first encounter with the form either on the stairs or in the bedroom. Likewise, when chasing the form to the beach, the defendant did not avail himself of any weapon although there were firearms available in the den and fire tools in the fireplace in the living room which he passed in going out the door to the lake side of the house.

"The defendant's injuries were the subject of some conflicting testimony. Doctors testifying for the State described his injuries as injuries to the right cheek of the face, a black eye, some damage to the right side of his forehead, some damage to the membrane of his mouth, and no indication of any injury to the back of the neck. Doctors for defendant not only report the injuries to the right side of his face, eye and mouth but also injuries to the spinous process of the second cervical vertebra and some swelling on the back of the neck. They do not claim that the skin was broken at this point. Whatever injuries the defendant sustained were caused by a blow or blows of the fist of an assailant. This was defendant's testimony, although he testified that his first encounter was in the bedroom where his wife came to her death as a result of many blows on the head with a blunt instrument. It was on this occasion and only then, that the defendant claims that there might have been two assailants 'one working over his wife' and the other striking defendant from the back with his fist. While he was following the form to the beach there was no suggestion that there was more than one object or form in front of him.

"The foregoing is a summary of much of the evidence dealing with many of the physical facts and conditions of the premises as found on July 4th and of declarations and

actions of the parties involved as testified to by the public authorities and other witnesses, together with what the defendant said to others and in his testimony upon trial in relation to the events of the morning. The testimony of the defendant, in dealing with the events that took place in his presence or the things that he did, was characterized by the State as vague, indefinite, uncertain or factually highly improbable. During the time he was under cross-examination the defendant gave evasive answers such as 'I can't recall' or 'I can't remember,' approximately 216 times to questions concerning facts and circumstances that took place in his claimed presence material to the issues in the case.

"The jury, under the instructions of the court, was presented with but one question or issue of fact and that was, 'had the State shown beyond reasonable doubt that the defendant purposely killed Marilyn Sheppard?'

"The State's case is based in part on circumstantial evidence. The law of Ohio on this subject requires that the facts and circumstances upon which the theory of guilt is based must be established beyond reasonable doubt and the facts so established must be entirely irreconcilable with any claim or theory of innocence and admit of no other hypothesis than the guilt of the accused. *Carter vs. State*, 4 Oh. App. 193.

"If, therefore, the jury, after careful deliberation, found that there was any possible hypothesis of innocence, after a consideration of all of the evidence, then the defendant would be legally entitled to be discharged, but if the jury found, after full deliberation, there was no possible hypothesis of innocence based on the facts as they found them to be, and that the facts found are such as to be

irreconcilable with any other reasonable hypothesis, than the guilt of the accused, then a verdict of guilty was required.

"This was a jury question and we hold that there was sufficient evidence to support the verdict of guilty as found by the jury." (Opinion of Court of Appeals, Appellant's App. pp. 30a-58a.)

FIRST ASSIGNMENT OF ERROR.

We shall proceed with the new and revised assignments of error in the order in which they are set forth in the brief of the appellant on the merits.

The first assignment of error relates both to a claim of misconduct of the jury and the officials in charge of the jury during its deliberations, and to the circumstantial evidence the defense asserts the State relied upon to support the verdict. These two branches do not have any logical connection in one assignment of error. We will, nevertheless, proceed to deal with them in the same order.

THERE WAS NO MISCONDUCT OF THE JURY OR OF THE OFFICIALS IN CHARGE OF THE JURY DURING ITS DELIBERATIONS.

We wish to point out, at the outset, that the matters complained of that took place in the hotel room when some of the jurors called their children on the telephone, or in the dining room of the hotel when their pictures were taken, were not during the jury's deliberations. The jurors deliberated in a room above the court room in the Criminal Courts Building and there is absolutely no evidence whatever in the record showing any misconduct of

the jury or of the officers in charge of the jury during its deliberations.

Pictures were taken of the male members and of the women members of the jury in the dining room of the hotel during meal time and not during the deliberations of the jury. The jurors had ceased their deliberations when they left the jury room and were taken to the hotel. The two groups of men and women were within a few feet of one another when the picture was taken and there is not a scintilla of evidence in the record that the jurors were subjected to any improper influence.

So, too, of the telephone calls to the husbands and children of the jurors, all made in the presence of the bailiff, were not made during the deliberations of the jury. They were made from the hotel room to which they had been taken from the jury room and there is no evidence whatsoever that the case was even discussed in these telephone calls, much less anything said prejudicial to the defendant.

There is no evidence whatsoever of telephone conversations with strangers, as suggested in the brief of the defense. The testimony of Bailiff Edgar Francis follows:

> "Q. Do you know, of your own knowledge, whether there was any telephone communications made out of any of the respective rooms that were occupied by any members of the jury?
>
> A. Their phones were cut out, Mr. Garmone.
>
> Q. By whose request?
>
> A. Mr. Steenstra arranged that.
>
> Q. And were there any telephone calls made from the room that you occupied?
>
> A. Yes, sir.

> Q. Did you make the calls, or did the jury make the calls?
>
> A. No. The jury made the calls, and I sat in the chair right alongside the telephone.
>
> * * *
>
> Q. Mr. Bailiff, what was the purpose of the calls that the jurors made in your presence?
>
> * * *
>
> A. Well, they were made to their husbands and wives, and those that had children, they talked to the children.
>
> Q. Was there any conversation whatsoever about this case or their deliberations?
>
> A. Not one word, Mr. Parrino." (R. 7084-7085.)

Bailiff Francis also testified that there was no conversation by any one, other than the bailiffs, with the jury with respect to the pictures taken (R. 7071-72); and all that the bailiff said to the jurors was in substance, "Do you mind having your pictures taken?"

It is urged that the court erred in refusing to permit Bailiff Francis "to testify what he knew about what was said from the other end of the line to the juror" (App. Br., p. 43). On the very same page of their brief it is disclosed from the record that Mr. Francis was asked the question:

> "Q. What it was said back to the juror you have no knowledge of?
>
> A. No." (R. 7085.)

Having been asked this question and given the answer, further questions on the same subject matter were clearly objectionable and objections were properly sustained.

The defense saw fit to call certain jurors to the witness stand on their motion for new trial and if they wished to

pursue this matter further, they had the right and opportunity so to do. They chose not to do so and there is nothing in the record whatever of anything having been said or done either by the bailiffs or by or to the jurors prejudicial to the defendant.

It is next urged that during the trial there was a broadcast by Walter Winchell, in which he related the story of a woman in New York who claimed she had been a mistress of Sam Sheppard. At the request of defense counsel the court inquired of the jurors whether they had heard this Winchell broadcast and two jurors responded that they had. The jurors had no knowledge that Mr. Winchell was to broadcast anything at all pertaining to the Sheppard case or to Sam Sheppard. The two jurors who heard the broadcast were asked by the Court: "Would that have any effect on your judgment?" Both answered, "No." The Court stated:

> "I do hope, ladies—I would like to ask if any of you know if any members of your families heard the broadcast?
>
> "Have any of you, other than these two ladies, heard anything about that broadcast last night? And I wish to ask you two ladies in particular, and all of you in general, to pay no attention whatever to that kind of scavenging. It has no place, in my judgment, on the air at all, but that is not for me to determine, but surely it has no place whatever in our thinking or considerations or thoughts in any way, shape or manner in this case. *Let's confine ourselves to this court room,* if you please." (R. 5429-30.)

Urged for the first time as error is the refusal of the trial court on motion for continuance in the 5th week of

trial to ask the jurors if they had heard a broadcast by Bob Considine over Station WHK in which there was something said about the testimony in the Sheppard case. This matter was brought up in the court's chambers and neither the court nor the prosecutors had any knowledge whatsoever of the alleged broadcast. Mr. Corrigan, counsel for the defendant, complained that Bob Considine had paralleled a denial of the defendant as set forth by Officer Schottke with a denial of Alger Hiss when he was confronted by Whittaker Chambers, without stating that Dr. Sheppard was in bed in the hospital at the time of his denial, while Mr. Hiss was strong, mentally and physically.

Apart from this assertion of counsel, no proof whatever was submitted to the court as to the exact nature of the broadcast, although Mr. Considine was available, it being conceded by the defense that he was in daily attendance at the trial (App. Br., p. 45). When the court stated: "We are not going to harass the jury every morning," Mr. Corrigan then responded, "I can't help it, Judge. If you don't, that's all right with me. I make my exception." (R. 3725.)

That it was not error for the court to refuse to interrogate or poll the jurors during the trial as to whether they had read a newspaper article or heard a radio broadcast such as the Considine broadcast, is affirmed by the annotation in 15 A. L. R. (2) 1152, wherein it is stated:

> "The present annotation is concerned with the question of whether, during a criminal trial, the jurors may be interrogated or polled as to whether they have read newspaper articles pertaining to the alleged crime or the trial. As the title indicates, the annotation involves the propriety of interrogation or polling after

impanelment, as distinguished from that which occurs on voir dire examination.

"The few cases that involve this specific point all uphold the trial court where it refuses to interrogate, or refuses to let a party interrogate, the jurors as to the reading of newspaper articles relating to the trial or the crime. The decisions generally turn on the fact that the trial court had instructed the jury not to read the articles or that there had been no showing by the moving party that the jurors had in fact read them."

The leading case in support of this annotation is *State of Minnesota v. DeZeler,* 41 N. W. 2d 313, 15 A. L. R. 2d 1137, decided by the Minnesota Supreme Court on January 13, 1950, in which it is stated:

(15 A. L. R. 2d p. 1149):

"5. It was not error to deny defendant's repeated requests that the jury be polled to determine if they had read certain newspaper articles pertaining to the crime and the conduct of the trial. On several occasions the trial court cautioned the jurors not to read the newspapers. When the jury has been clearly admonished not to read newspaper accounts of the trial, the granting or denial of a defendant's request that the jurors be interrogated during the trial as to whether they have read newspaper accounts or headlines rests in the sound discretion of the trial court. People v. Phillips, 120 Cal. App. 644, 8 P. 2d 228; 23 C. J. S., Criminal Law, Sec. 1449. When a jury has been clearly admonished not to do a certain act, the mere opportunity to violate that admonition, without a vestige of proof of its violation, provides no basis upon which a court of review can find that the trial court has abused its discretion in refusing to investigate the jury for such possible misconduct. As an essential of a fair and impartial trial, there is no presumption that the jury

is likely to take advantage of every opportunity to disregard the cautionary instructions of the court * * *."

The defense repeatedly assert that the newspapers were hostile to the defendant and sought his conviction. Though this unsupported claim is constantly repeated and grows in vehemence each time it is so repeated, it is simply not the fact. News agencies such as newspapers and the radio were greatly interested in the case, as they would be in any similar case. The news stories and broadcasts giving their respective versions of the testimony in the case and of the other proceedings had, may not at all times have been agreeable or pleasing to either the State or the defense. Certainly, the court has no control over what the newspapers shall print or what the radio stations shall broadcast. As far as the jurors were concerned, they were repeatedly instructed to disregard all such stories and broadcasts and to decide the case solely on the basis of the evidence presented in open court and on the law given to them by the judge. The record discloses nothing that would show that the jurors were improperly influenced in any manner whatsoever. The claims of the defense that the jury and the officers in charge of the jury during its deliberations were guilty of misconduct to the prejudice of the defendant is based on the mere assertion and argument of counsel. There is no evidence that the defendant was prejudiced. On the contrary, the jurors deliberated patiently, carefully and thoughtfully for a period of five days, and reached a verdict which responded to the evidence.

The defense would make it appear that the trial court threatened to bar Steve Sheppard from the court room if

he did not desist from trying the case in the newspapers. It should be pointed out that Steve Sheppard expected to be a witness and that under the rule of separation of witnesses had no right to be in the court room. Notwithstanding the fact that he was to be a witness, the court extended to him the privilege of being in the court room and in assisting counsel for the defense. The court was merely reminding counsel that the privilege would be withdrawn if Steve Sheppard continued such conduct (R. 3722). This all took place in the Court's chambers just before the Considine broadcast was brought to the attention of the court, and the Court said:

> "Let it be now understood that if Dr. Steve Sheppard wishes to use the newspapers to try his case while we are trying it here, he will be barred from remaining in the court room during the progress of the trial *if he is to be a witness in the case.*" (R. 3722.)

In any event, Stephen Sheppard remained in the court room during the entire trial.

In 15 *O. Jur.* 2nd, it is stated in Section 492, at page 662:

> "Where newspaper articles are published concerning a crime being prosecuted or concerning the criminal prosecution while the trial is in progress, there is no ground for a mistrial where there is nothing to show that the jurors saw or read such articles; the court may not presume that the jurors saw the newspaper articles, read them, and were prejudiced thereby.
>
> State v. Fouts, 79 O. App. 255;
> State v. Naples, 94 O. App. 33, dismd for want of debat q. 158 O. S. 231;
> Ryan v. State, 10 O. C. C. N. S. 497, affd without op in 79 O. S. 452."

In *Emmert v. The State*, 127 O. S. 235 (1933) it was held:

> "Affidavits or testimony of jurors may be received upon motion for new trial, to prove unlawful communications made to members of the jury by court officers or others, outside the jury room but during the period of the jury's deliberations."

And in *State v. Joseph*, 90 O. A. 433 (1950) it was held that there must be a showing that conversation was had with the jurors concerning the facts or law of the case. In the *Joseph* case, the Court stated, at p. 434:

> "If the defendant had any reason to believe that he was prejudiced by the act of the trial judge he had the full right to take the affidavits or testimony of the jurors on the subject. As late as State v. Adams, supra, it was held that the rule that affidavits or testimony of jurors will not be received to impeach their verdict unless evidence aliunde of irregularity in the deliberations of the jury or in the return of a verdict is first shown has no application where such irregularity is due to the misconduct of an officer of the court."

In the *Joseph* case, the court stated further, at page 435:

> "Section 13449-5, General Code, having application to criminal procedure, provides in part:
>
> 'No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court * * * for any other cause whatsoever unless it shall affirmatively appear from the record that the accused was prejudiced thereby or was prevented from having a fair trial.'
>
> "That section of the Code alone would preclude this Court holding that the action of the trial judge was prejudicial to the defendant. In McHugh v. State,

42 Ohio St., 154, it is said that a reviewing court regards the record as free from error until the contrary clearly appears."

In the instant case it is not shown by the record that the jury were in fact guilty of misconduct. It is nothing short of ridiculous to claim that the defendant was prejudiced in the absence of a showing that anything was said to the jurors or by the bailiffs to the jurors concerning the facts or law of the case.

The defense cite the case of *Farrer v. State of Ohio*, 2 O. 54, wherein it appears that the jurors had conversations with persons on the street in regard to the subject of their deliberations and also that they secured and actually used a part of a newspaper purporting to contain a part of the charge of the court in the case they were considering, and used the information to guide them in their deliberations. We have no such parallel situation in this case. There is no evidence that the jurors in the instant case discussed the case with anyone and there is no evidence that they read or used any newspaper or any part of any newspaper to assist them in their deliberations.

Furthermore, the *Farrer* and *Dillon* cases and other early cases cited were decided before the enactment of Section 13449-5, effected July 21, 1929, now Revised Code Section 2945.83, having application to criminal procedure on review, which provides in part:

"No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:

* * *

(E) Any other cause unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial."

EVIDENCE FULLY SUPPORTS VERDICT OF GUILT BEYOND A REASONABLE DOUBT.

The defense have picked out a selected list of subjects, colored them with their own conjectures, suppositions, arguments and inferences and then blandly state that this is the circumstantial evidence relied upon by the State to support the verdict. Much of the evidence in the case is totally ignored and even these selected subjects are given incorrect and distorted treatment by the defense. The selected subjects have been heretofore discussed in this brief and in the preceding brief filed on the motion for leave to appeal.

The State proved by direct and circumstantial evidence that Marilyn Sheppard was brutally murdered in her bedroom; that at the time she was murdered the only person in that home, except Chip, was the defendant. It is conclusive from the evidence that there was a simulated burglary and nobody but the defendant would fake such a burglary to divert suspicion from himself. The fantastic stories told by the defendant were so unreasonable and absurd as to be, in the opinion of the jury, unworthy of credence.

Also revealed in the evidence is a background and setting for this crime. The State proved that the defendant had love affairs with other women and that he had lied about them under oath, and that he had discussed and considered divorce. The defendant himself testified that Marilyn had become "sexually non-aggressive" and that "sexual relationship was painful to her." There can be no doubt that there were marital difficulties.

Defense counsel treat each part of the evidence as though it was an isolated fragment to be considered by it-

self and wholly apart from all of the other evidence. The evidentiary facts received in evidence are not to be considered as isolated fragments and separate and apart from each other. Considered together, and in their entirety, they present a mass of evidence which proves the defendant guilty beyond a reasonable doubt of the crime charged.

Under the principles of the law of circumstantial evidence, a case in point and which closely parallels the instant case is *Hinshaw v. State,* 47 N. E. 157 (Sup. Ct. of Indiana) (1897), wherein a husband was convicted of second-degree murder of his wife.

Counsel for the defendant in the instant case argue negative evidence and select certain pieces of evidence in an effort to show that the defendant was not guilty. In the *Hinshaw* case, the Court stated (at page 172):

> "* * * Must the jury be directed to take the evidence of the State, piece by piece, and reject every part in which a flaw may be found? It is good military strategy to divide and conquer. It is not a sound or just rule which requires the prosecution in a state case to make voluntary division of its forces, so that they may be beaten in detail. And so we say it is not the law that the jury in a criminal case must take the evidentiary facts piece by piece, and consider each item separate and apart from the other items or the whole evidence."
>
> * * *
>
> "Evidence is not to be considered in fragmentary parts, and as though each fact or circumstance stood apart from the others, but the entire evidence is to be considered, and the weight of the testimony to be determined from the whole body of the evidence. * * *"

On the subject of the legal force of exclusive opportunity the defendant in the instant case had, to commit this crime as a circumstance tending to prove his guilt, the Court in the *Hinshaw* case says at page 164:

> "Where the relation between the parties is of a still more intimate character, as between members of the same family, and particularly between husband and wife, opportunities for the commission of crimes of the highest grade become indefinitely multiplied. They are, in fact, of hourly occurrence. There exist in the relation last mentioned all the elements to constitute the most perfect opportunity that can be desired, unlimited access to the person, and complete seclusion during the hours when that person is in its most defenseless state." * * *

The authorities cited by defense counsel in their previous brief support the proposition that all circumstances must be taken together, *and when taken together,* must then point surely and unerringly to the guilt of the defendant, and must be inconsistent with any other rational supposition than that the defendant is guilty of the offense charged.

As early as *Breck v. State,* 4 C. C. 160, affirmed by Supreme Court without report on March 29, 1889, the Court held:

> "Where reliance for conviction is upon circumstantial evidence, it is not necessary that a circumstance should be proved beyond a reasonable doubt, unless it is a necessary link in a chain of circumstances, which chain of circumstances is necessary to a conviction. *A person may be properly convicted by a large number of circumstances, no one of which alone is established beyond a reasonable doubt.*"

During the impaneling of the jury in the instant case, defense counsel stated that circumstantial evidence may be even stronger than direct evidence. And in *Hess v. State,* 5 O. 5, the Court said, at p. 10:

> "It can hardly be deemed necessary at this day to go into any course of reasoning to prove that circumstantial or presumptive evidence is allowed to prevail, even to the convicting of an offender. In the language of the writers on evidence, 'it is essential to the well-being, at least, if not to the very existence of civil society, that it should be understood, that the secrecy with which crimes are committed, will not insure impunity to the offender.' * * * Such evidence is allowable, because it is, in its own nature, capable of producing the highest degree of moral certainty. Crimes of any magnitude are rarely committed without affording vestiges, by which the offender may be traced; and very often the means he adopts for his security, turn out to be the most cogent arguments of his guilt."

The means adopted by this defendant for his security to deceive the authorities turns out to be the most cogent argument of his guilt. There is no question from the evidence but that this defendant and no one else sought to deceive the authorities by making it appear that someone came in that home, murdered his wife and took his valuables. No one but the defendant knew that those articles were gone until they were found. He had not told the police or anyone that morning of July 4th that these articles were missing.

SECOND ASSIGNMENT OF ERROR.

INFERENCES DRAWN BY THE JURY WERE BASED UPON FACTS ESTABLISHED BY THE EVIDENCE.

Under this assignment of error the defense state: "Piling inference upon inference urged upon the jury."

The defense do not indicate wherein the charge of the court on the subject of circumstantial evidence and inferences to be drawn therefrom is in any way erroneous. The jury were properly instructed by the court on this subject as follows:

> "There are two classes or types of evidence and both are involved in most cases of the kind and character of this case. They are designated as direct evidence and circumstantial evidence. Both are proper and one is as effective as the other if equally convincing under the rules of law for its application. Direct evidence is that given by a witness on the basis of the dictates of his own senses—what he himself heard; what he saw; what he did; what he said—matters which he himself knows. Circumstantial evidence is that which is furnished as to a fact which may not be the fact or situation sought to be proven but is a fact from which a fair inference can be drawn tending to prove the fact or situation sought to be shown or proven. * * * (R. 7004-7005.)
>
> * * *
>
> "It is for you to determine how much of circumstantial evidence adduced in this case is credible and what fair inferences are to be drawn from it. You are instructed that any inference drawn must in every instance be drawn from a proven or established fact. In other words, you are not to draw a second or further inference upon an inference but that is not to say that you are confined to drawing only one inference

from one fact. There is no limit to the number of independent inferences that may be drawn from a fact. The rule is simply that every inference must be drawn from, and based on, a fact and that once having drawn an inference one may not draw a second inference from the first.

"It is necessary that you keep in mind, and you are so instructed, that where circumstantial evidence is adduced it, together with all other evidence, must convince you on the issue involved beyond a reasonable doubt and that where circumstantial evidence alone is relied upon in the proof of any element essential to a finding of guilt such evidence, together with any and all other evidence in the case, and with all the facts and circumstances of the case as found by you must be such as to convince you beyond a reasonable doubt and be consistent only with the theory of guilt and inconsistent with any theory of innocence. If evidence is equally consistent with the theory of innocence as it is with the theory of guilt it is to be resolved in favor of the theory of innocence." (R. 7005-7006.)

Surely, the jury was not required to accept the versions of counsel for the defense as to what inferences may be drawn from the evidence, nor is the jury limited by law to one inference from any fact or group of facts established by the evidence. See *House v. Stark Iron & Metal Company,* 33 O. L. Abs. 345, 350, 34 N. E. (2) 592; *Hartenstein v. New York York Life Insurance Co.,* 93 O. App. 413; *City of Cleveland v. McNea,* 158 O. S. 138.

As recent as December 14, 1955, in the case of *Hurt v. Charles J. Rogers Transportation Co., et al.,* 164 O. S. 329, Judge Bell discusses quite thoroughly the law of evidence pertaining to inferences, and the syllabi of that case read:

"1. An inference based solely and entirely upon another inference, unsupported by any additional fact or another inference from other facts, is an inference on an inference and may not be indulged in by a jury.

"2. An inference which is based in part upon another inference and in part upon facts is a parallel inference and, if reasonable, may be indulged in by a jury.

"3. It is permissible for a jury to draw several conclusions or presumptions of fact from the same set of facts and equally permissible for a jury to use a series of facts or circumstances as a basis for ultimate findings or inferences.

"4. The weight of an inference as well as the weight of the explanation offered to meet the inference is for the determination of the trier of the facts, unless the explanation is such that reasonable minds could not reach different conclusions as to its preponderating value when measured against the weight of the circumstantial evidence."

THIRD ASSIGNMENT OF ERROR.

THERE WAS NO ERROR IN THE CHARGE OF THE COURT ON CIRCUMSTANTIAL EVIDENCE.

At page 77 of the brief of the defense they claim that the court "went all wrong" in its charge on circumstantial evidence. They proceed to quote a portion of the charge on that subject and claim that that portion of the charge does not apply to criminal cases where the proof must be beyond a reasonable doubt to support a verdict of guilty. This is something new again in the brief of the defense and is being urged for the first time in this Court.

An examination of the charge of the court on the subject of circumstantial evidence, as set forth in the Record

at pages 7005-7006, and on pages 99-100 of this brief, and from which the excerpt is quoted by the defense in their brief at page 77, will show that the trial court properly instructed the jury that where circumstantial evidence alone is relied upon in the proof of any element essential to a finding of guilt such evidence, together with any and all other evidence in the case, and with all the facts and circumstances of the case as found by the jury must be such as to convince them *beyond a reasonable doubt* and be consistent only with the theory of guilt and inconsistent with any theory of innocence.

The fact that the court did not use the language of the charge submitted by counsel on the same subject matter does not make the charge as given erroneous.

FOURTH ASSIGNMENT OF ERROR.

THE INSTRUCTION OF THE TRIAL COURT ON REPUTATION AND CHARACTER EVIDENCE WAS CORRECT AND PROPER.

The following is the trial court's charge on this subject:

> "Some evidence has been given in this case concerning the claimed general conduct and reputation of the defendant and it is proper to present such evidence for your consideration. It is not admitted because it furnishes proof of guilt or innocence but because it is a matter of common knowledge that people of good character and reputation do not generally commit serious or major crimes. Such evidence, if believed, may be of some help to you in your consideration of the total evidence and the situation as a whole. The court wishes to caution you, however, that good character and a good reputation will not avail any person charged with a crime against proof of guilt beyond a reasonable doubt." (R. 7006-7.)

It is not clear from the argument of the defense under this assignment of error as to how the above instruction of the court was improper. It appears that they are claiming that the court did not appreciate that the jury should have been instructed to give more weight to the evidence that the defendant had propensities for peacefulness and quiet, than to the evidence that the defendant was a philanderer. This the court was not required to do.

By this charge the court did not take from the jury the right to consider the character evidence with all of the other evidence in determining the question of defendant's guilt or innocence. In fact, the court left it to the jury to give full consideration to all of the evidence including character evidence, in coming to their verdict.

In *Harrington v. State*, 19 O. S. 264, the Court said, at page 269:

> "The true rule is said to be, 'that the testimony (character evidence) is to go to the jury and be considered by them in connection with all the other facts and circumstances, and if they believe the accused to be guilty they must so find, notwithstanding his good character.' "

Approved in *Stewart v. State*, 22 O. S. 477.

The trial court correctly instructed the jury further that good character and good reputation will not avail any person charged with a crime against proof of guilt beyond a reasonable doubt. In *State v. Wayne Neal*, 97 O. A. 339, 351, Appeal Dismissed by the Supreme Court in 162 O. S. 212, substantially the same instruction on character

evidence was upheld. In that case the Court of Appeals stated (p. 351):

> "This is the same as saying, 'if you have no doubt whatever of the defendant's guilt, after considering all the evidence, character evidence should not set him free from such criminal conduct clearly established.' "

The defense cite *Donaldson v. The State,* 5 O. C. D. 98 (1896). In that case the reviewing court criticized the portion of a charge on character evidence which instructed the jury to consider the evidence in the case *outside of the evidence as to character,* and interpreted the charge to convey the idea that the evidence as to good character is to be considered as separate and apart from the other evidence in the case and is to be applied only in the event the other evidence leaves the jury in doubt as to whether the defendant is guilty. We have no such charge in the instant case. As a matter of fact, the reviewing court in the *Donaldson* case concludes (p. 100):

> "The whole testimony should be looked at together, and if on a fair consideration of the whole of it, a reasonable doubt of the defendant's guilt exists, it should go to his acquittal. *But if on the whole evidence there is no such reasonable doubt of his guilt, the jury should so find, notwithstanding the proof as to good character.*"

PUBLICITY.

The defense close their brief with utterly absurd assertions that newspapers and radio stations sought to convict the defendant by slanted news stories. That the public was interested in this murder mystery and that there was considerable publicity is, of course, true. But it is not true

that any news agency, newspaper or radio station, slanted stories to convict the defendant, and defense counsel do not, by mere repetition, make true that which is untrue.

It is pertinent to ask: What caused the publicity, and who brought it about?

Marilyn Sheppard was murdered—there could be no doubt about that—and it became the duty of law enforcement officers to thoroughly investigate and to bring to justice the person who murdered her. A protective shield was immediately thrown around the defendant. The officials of Bay Village, close personal friends of the defendant who was their police surgeon, sat on their hands and were getting nowhere. It was inevitable that there would be publicity concerning the defendant's unwillingness to be interrogated, save on his own terms and conditions, and that the public officials would be criticized, such criticism of public officials not being the exclusive prerogative of defense counsel. These incidents occurred in July and the trial did not begin until the 19th of October.

There was no assurance that the publicity would not continue if a motion for a continuance was granted. Further, the trial court was not required to speculate as to whether a trial at a later date would result in more or less publicity. The Constitution provides that the defendant in a criminal case is entitled to a speedy and public trial. As it was, the defendant was not brought to trial until three and a half months after the crime was committed, and the trial court was not required, in view of the Constitutional provision, to delay the trial indefinitely, otherwise the defendant could be heard to complain that his constitutional right to a speedy and public trial was violated.

During the trial most of the publicity was given out by the defense. As a former newspaper man, defense counsel knew very well how to get favorable stories in the public press, and he was quite successful. He held press conferences daily, and frequently more than once each day; and, with his client, posed for hundreds of pictures which, together with favorable personal stories, appeared in all types of news media. The amount of publicity so put out by the defense was enormous, and far outshadowed the attention given the State. Defense counsel found that by continually denouncing the newspapers and public officials, he could get an even greater amount of publicity. We direct the attention of this Court to our former brief, pages 88 to 108 inclusive, where this matter of publicity is treated in greater detail.

The charges that stories were slanted to convict the defendant are utterly fantastic and without support in the record. There is certainly nothing in the record to show that the jury was influenced or was biased or prejudiced by any such publicity. The case was considered patiently and carefully by the jury over a period of five days, under proper instructions of the court and without any bias or prejudice. The jury decided the issues on the basis of what was presented in court, and on nothing else.

The trial of this cause took a period of nine weeks and throughout that time the trial court carefully safeguarded the Constitutional rights of this defendant. The picture presented by defense counsel of what transpired is completely distorted. For an accurate statement as to the conduct of the trial and the arrangements made for reporters and others in attendance at the trial, we refer

this Court to the opinion of the trial judge rendered upon the motion for new trial (Jr. 84, pages 9-11) appearing on pages 100 to 102 of our former brief.

The publicity, much of it originating with the defense, reflected the public interest in a "whodunit," not in hostility toward the defendant. As stated by the trial judge, "It is to be borne in mind that no issues which break into flames and which tend to produce passion and prejudice were involved in this cause. No issue of race, corruption, killing an officer, or the like, was involved—what actually was involved was a mere mystery—a 'whodunit'."

During the impaneling of the jury, the progress of the trial, the instructions of the court and the summations of the attorneys, the jurors were repeatedly told that this cause was to be decided solely on the basis of the evidence presented in open court and on the law given them by the judge, and on nothing else. Each juror agreed that he or she would disregard everything other than the evidence and would, in conformity with the instructions of the court, render a fair and impartial verdict. It is to be noted that a fair and impartial jury was impaneled and that the defense did not exhaust their peremptory challenges. The jurors took the oath required by law and there is not a shred of evidence in the record that each and every juror did not fully and completely abide by the oath so taken.

There is not a particle of evidence in the record to show that the jury was in any way influenced by reports or stories in newspapers, over the radio, or on television; or that the jury or any juror was biased or prejudiced by any such stories or broadcasts.

In 39 *Am. Jur.*, p. 101, Sec. 86 it is stated:

"* * * if it does not appear that the jurors have read the newspapers, a verdict will not be set aside merely because articles were published during the trial which were likely to influence the jury."

Annotated under this statement is the case of *Fields v. Dewitt*, 71 Kan. 676, 81 P. 467, 6 Ann. Cas. 349, in which it was held that where articles discussing the merits of a case are shown to have been published during the trial in newspapers of general circulation in the community, it cannot be presumed upon review, against the finding of the trial court, that they were read by the jury, if there is no direct evidence to that effect.

The defendant had a fair trial before a fair and competent judge and by an impartial, unbiased and unprejudiced jury. We have every reason to believe and do believe that the jury carried out the repeated instructions of the trial court to decide this case on the basis of what they heard in open court and on nothing else. This the jury did, and their verdict of guilt was fully supported by the evidence and should be affirmed.

Respectfully submitted,

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